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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ————

HENRY I. SIEGEL CO., INC., - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
ET AL., - - - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner Henry I. Siegel Co., Inc., respectfully prays that a writ of certiorari issue to review the decree and opinion of the United States Court of Appeals of the Sixth Circuit, entered in this proceeding on November 4, 1969. The respondents here, in addition to the National Labor Relations Board, are W. C. Keaton, former Mayor of Hohenwald, Tennessee, and Amalgamated Clothing Workers of America, AFL-CIO. The latter two parties each filed, as did the petitioner, petitions to review the order of the Board, all three cases being consolidated and disposed of as one before the Court of Appeals.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 17-39)[1] is reported at 417 F.2d 1206.

The opinion of the National Labor Relations Board (Appendix B, *infra*, pp. 40-45), and the decision of the trial examiner (Appendix C, *infra*, pp. 45-106) are reported at 172 N.L.R.B. No. 88, but have not yet been compiled into the bound official report.

JURISDICTION.

The opinion of the Court of Appeals for the Sixth Circuit, together with the decree entered in conformity with the opinion, was entered on November 4, 1969. A timely petition for rehearing, together with suggestion for rehearing in banc, filed by the petitioner, was denied on March 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

The questions presented are:

(1) Whether under the agency definition of the National Labor Relations Act, the city's mayor, who for his own reasons and at his own expense caused anti-union literature to be disseminated to the petitioner's employees, was properly found to be the petitioner's

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[1]Appendix A does not include the appendix to the opinion of the court; said appendix consisted of a newspaper advertisement which is reproduced in the Joint Appendix filed in the court below at p. 21. Reference will hereinafter be made to Joint Appendix as "J.A. p. ——."

agent, his conduct not being disavowed by the petitioner?

(2) Whether the campaign literature and speeches exceeded permissible bounds so as to be without the protection afforded by the Constitution and Section 8(c) of the National Labor Relations Act?

(3) Whether the order of the National Labor Relations Board, enforced as modified, is sufficiently specific in its terms (Fed. R. Civ. P. 65(d)), and narrow in the scope of its prohibitions in light of the unlawful activity found to exist solely in the campaign propaganda?

STATUTORY PROVISIONS INVOLVED.

A. National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C.A. §§ 151 *et seq.* (1965)).

Definitions.

Sec. 2. When used in this Act—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly. . . .

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Sec. 8(c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

B. Federal Rules of Civil Procedure—

Rule 65(d). Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall . . . be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . . .

STATEMENT OF THE CASE.

This case centers around a union election at the petitioner's plant in Hohenwald, a small city in Lewis County, Tennessee, and the election propaganda distributed by the petitioner and the mayor of the city in connection with the union campaign.

As mayor, W. C. Keaton had in 1954 participated on behalf of the city in transactions whereunder the petitioner leased from the city and county a plant, and bonds issued and sold by the city and county provided the financing for its construction (J.A. 53-54, 67-69).

Although he was a friend of one of petitioner's executives, the mayor rarely visited the plant, never referred employees for employment, and never represented petitioner in any legal or business matter (J.A. 76, 78, 94, 96, 116).

On at least one occasion in February, 1963, the mayor at a civic club meeting spoke out against a union and its organizing activities at another company; there was no proof of the presence of any of petitioner's executives at the meeting (J.A. 36-39, 58, 63, 70, 115).

The Union began its organizing activities at the plant in 1962, demanded recognition in January 1965, and continued its campaign through the election scheduled and held on April 9, 1965 (J.A. 17, 121-22, 125-26).

In March, 1965, the mayor requested, and was given, a list of the names and addresses of the petitioner's Hohenwald employees; he did not state, and was not asked for, the purpose of his request; he had on prior occasions requested and received similar information (J.A. 16, 75-76, 85, 87-89, 97, 105, 110-11, 121). He had never before mailed anything to petitioner's employees (J.A. 89).

Prior to April 1, 1965, the mayor suggested that the editor of the local weekly paper write an editorial concerning the forthcoming election. This the editor did, the editorial appearing in the April 1 issue (J.A. 16, 18-19, 74-75, 81). In the weekly issue of April 8, the mayor prepared, paid for and caused to be inserted a two-page advertisement dealing with the election. He caused copies of each issue to be mailed to petitioner's employees, and a copy of the advertisement in the form of a handbill to be distributed in the petitioner's parking lot and to cars and residences throughout the city (J.A. 16, 21-22, 75-77, 81, 85). In the mailing of

the issues of the newspaper to the employees, there was no envelope or return address to identify the sender (J.A. 91-92, 94-95). The mayor's suggestions as to the editorial, his preparation of the advertisement, his mailing of the issues of the newspaper, and his distribution of the advertisement, were undertaken by him for his personal reasons, at his own expense, and with no prior knowledge on the part of the petitioner or its executives (J.A. 16, 73-74, 76-77, 81-86, 89-94, 104, 112, 114-15, 117-19, 123).

The petitioner mailed or distributed to its Hohenwald employees in connection with the election three letters dated March 31, April 6 and April 7, 1965. On the morning of April 8, 1965, the petitioner's president spoke to assembled employees concerning the election (J.A. 16-17, 23-35).

The distribution of the mayor's handbill advertisement was made on the afternoon of April 8 (J.A. 101, 118). The petitioner did not disavow the editorial or the advertisement, its officials believing that the identity of the authors was apparent; further, its officials were unaware that the newspaper issues had been mailed to employees until after the election (J.A. 98-102, 114, 117-19, 122-23).

The trial examiner, apparently on a theory of conspiracy or joint endeavor;[2] the Board, solely on the basis of his agency relationship;[3] and the Sixth Circuit, on a blending of agency and partnership,[4] found

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[2]Appendix C, *infra*, pp. 78, 83, 85.

[3]Appendix B, *infra*, p. 41.

[4]Appendix A, *infra*, pp. 29-31. Judge Weick dissented on this point. (*Id.* pp. 36-38).

the petitioner to be responsible for the mayor's activities.

In the campaign literature, the trial examiner pointed to no specific threats or objectionable language, but in bombastic language concluded that the statements as a whole had unfairly hobbled the employees' choice.[5] This conclusion was approved by both the Board and the court.

The content of the campaign propaganda forms the sole basis for the sweeping order entered by the Board and, as modified, approved by the court.[6]

REASON FOR GRANTING THE WRIT.

This Case Involves Important Questions of Federal Law, Which are Particularly Significant in the Administration of the National Labor Relations Act.

The issues here—agency, free speech, cease and desist orders—are not novel, but each is of obvious significance in the administration of the law. Importance, and necessity for review, attaches because in each area there is an apparent lack of specific legal guideline, which only this Court can provide, and by which the issues may be impartially and justly resolved.

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[5]Appendix C, *infra*, pp. 74-79.

[6]What is apparently now the modified order appears as Appendix D, *infra*, pp. 106-07.

A. Agency.

With regard to the National Labor Relations Act, the latest pronouncements of this Court on the subject were made approximately thirty years ago. In *IAM,*[7] *Heinz*[8] *and Link-Belt,*[9] the Court declared that strict principles of *respondeat superior* need not be applied in determining employer responsibility for the acts of those whom the employees might reasonably consider to be spokesmen for the employer.

At the time, the Wagner Act defined employer to include any person "acting in the interest of an employer"[10]—certainly a loose and indeterminate standard.

After that time and in 1947, Congress amended the Act by the addition of Section 2(13), a provision under which Congress declared "both employers and labor organizations will be responsible for the acts of their agents in accordance with the common law rules of agency (and only ordinary evidence will be required to establish the agent's authority)."[11]

Such language suggests that Congress intended a restoration of the common-law principles of agency and a meaningful application of those principles based on substantial evidence on the record considered as a whole. In declaring such to be the Congressional in-

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[7]IAM v. NLRB, 311 U.S. 72 (1940).
[8]H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).
[9]NLRB v. Link-Belt Co., 311 U.S. 584 (1941).
[10]Sec. 2(2), Public No. 198, 74th Cong., 49 Stat. 449.
[11]U. S. CODE CONG. SERVICE, 80th Congress, 1st Sess., 1142 (1947).

tent, one court repudiated a Board finding that strikers should be denied reinstatement, the Board having concluded that strikers were not entitled to reinstatement because on agency principles they, by failing to repudiate the violent acts of some, had made such acts their own.[12] The case suggests an underlying question here—when must disavowal be made to avoid vicarious responsibility?

Where supervisors or other managerial employees are involved in unlawful activity, the agency principle of actual or apparent authority has been sufficient to affix responsibility, the doctrine of the *IAM-Heinz-Link-Belt* trilogy being relied on and quoted with approval.[13] Even here, however, courts have occasionally required more than a mere showing of supervisory status.[14]

This case presents a different problem, that of one not occupying a position in the managerial hierarchy, or subject to its direct control—and in this area application of common-law agency principles becomes more strained.[15] Where a company has permitted speeches to employees on company property by out-

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[12]International Ladies Garment Workers Union v. NLRB, 237 F.2d 545 (D.C. Cir. 1956).

[13]*E.g.*, Furr's, Inc. v. NLRB, 381 F.2d 562 (10th Cir. 1967).

[14]Boyles Famous Corned Beef Co. v. NLRB, 400 F.2d 154 (8th Cir. 1968) (there must be some connection between supervisor's action and management, either by way of instigation, direction, or approval, or at the very least acquiescence).

[15]For example, in *NLRB* v. *Moench Tanning Co.*, 121 F.2d 951 (2d Cir. 1941), the court found an employer to be responsible for the acts of its supervisors though it might not have been under strict agency principles (citing the trilogy), but could not apply such rationale to the statements of a city attorney, a local banker, and articles in a village newspaper.

siders,[16] where outsiders have injected themselves into the employment relationship as by referring employees for employment or adjusting grievances,[17] or where their activities have been inspired by the company or undertaken with its assistance and cooperation[18]—the courts' determinations of responsibility may fairly be said to be based on actual or apparent authority—but such applications cannot be made on the facts of this case.

Where, however, the unlawful activity merely comes to the attention of the person sought to be charged who then fails to disavow, the rational basis of decision, particularly under traditional agency principles, is indeed tenuous. In some cases, mere knowledge of unlawful activity coupled with a failure to disavow has been said to be sufficient.[19] The difficulty with this line of cases is that the ultimate basis for requiring disavowal is to avoid the principle of ratification. The *Restatement* defines ratification as the affirmance by a person of a prior act which did not bind him but

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[16]NLRB v. Byrds Mfg. Corp., 324 F.2d 329 (8th Cir. 1963).

[17]Clarke v. NLRB, 410 F.2d 756 (4th Cir., 1969); Amalgamated Clothing Workers of America v. NLRB, 371 F.2d 740 (D.C. Cir. 1966) (Hamburg Shirt Corp.); Colson Corp. v. NLRB, 347 F.2d 128 (8th Cir. 1965); NLRB v. Arkansas-Louisiana Gas Co., 333 F.2d 790 (8th Cir. 1964).

[18]NLRB v. Mylan-Sparta Co., 166 F.2d 485 (6th Cir. 1948); Reliance Mfg. Co. v. NLRB, 125 F.2d 311 (7th Cir. 1941).

[19]NLRB v. Lake Butler Apparel Co., 392 F.2d 76 (5th Cir. 1968) (an editorial in a newspaper article should not have been considered); NLRB v. General Metals Products Co., 410 F.2d 473 (6th Cir. 1969). *But see* NLRB v. Mayer, 196 F.2d 286 (5th Cir. 1952); NLRB v. Russell Mfg. Co., 187 F.2d 296 (5th Cir. 1951).

which was done or professedly done on his account,[20] but ratification does not result from the affirmance of a transaction with a third person unless the one acting purported to be acting for the ratifier; further, an act of service involving a transaction of the third person is subject to ratification if, but only if, the one doing the act intends or purports to perform as the servant of another.[21]

Here the mayor did not intend or purport to act for the petitioner in any manner; thus the petitioner could not under accepted common-law principles of agency ratify his acts. There was clearly no actual authority, and his apparent authority is not perceivable. The mailing of the newspaper issues did not identify the sender, the mayor had not previously injected himself into the employment relationship, the petitioner's communications to its employees had ceased when the first material (the handbill) identifiable with the mayor issued, and its president's speech in complete context could not have vested, to any objective observer, the mayor, any more than any other official of the city or county, with apparent authority to speak for it—in short, the employees could not reasonably have concluded that the mayor spoke for the petitioner. The only apparent basis, on which the Board relied before

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[20] 1 RESTATEMENT OF AGENCY 2d §82 (1958).

[21] *Id.* §85. This same principle has been expressly recognized by the Board, but unexplainedly, was not applied here. See Ottenheimer & Co., 144 N.L.R.B. 38, 39 at n. 1 (1963), *aff'd sub nom.*, Amalgamated Clothing Workers of America v. NLRB, 334 F.2d 581 (D.C. Cir. 1964).

the Sixth Circuit[22] but which the court, being content to rely on an agency-partnership theory, did not reach[23] is that of disavowal.

Where there is knowledge of possible unlawful acts which may directly or indirectly benefit an employer or a union or even a striking employee, is that party under a positive duty to disavow such acts to avoid responsibility therefor? This Court has not spoken on that question. In light of the amendment of the Act, is the *IAM-Heinz-Link-Belt* trilogy still a viable pronouncement of law, and if so, does it mean that a lesser quantum of proof is required for the application of a common-law principle of agency, or does it mean that a common-law principle of agency need not be applied? This Court has not spoken.

A denial of certiorari establishes another loose precedent—the limbo of uncertainty remains. Certain and just and impartial administration of the law requires an answer.

B. Free Speech.

The petitioner recognizes that particularly in light of *Gissel*,[24] there is little likelihood that this Court will grant certiorari solely to review campaign propaganda found objectionable by the Board.

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[22]NLRB Brief at pp. 23-27.

[23]Appendix A, *infra*, p. 31.

[24]NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). However, other than the dissemination of campaign propaganda, there was here no other unlawful conduct alleged or proved. Thus, there is no unlawful conduct coloring the propaganda. *Cf.*, NLRB v. Exchange Parts Co., 375 U.S. 405, 409 at n. 3 (1964).

Gissel advises—avoid brinkmanship—while it recognizes that the Board will determine brinkmanship.

Participants in an election campaign thus face the Board in the position of Alice, who was scornfully admonished by Humpty-Dumpty, "When I use a word, it means just what I choose it to mean—neither more nor less." Even Professor Bok, so often cited, warns against the tendency to discover veiled threats or sinister ambiguities by placing a strained interpretation on an employer's remarks, and urges the articulation ofa body of legal doctrine of demonstrable impartiality.[25]

Obviously, the drawing of the line between permissible and impermissible is difficult, and it may well-nigh be impossible to set forth principles from whence location of the line may thereafter be determined. But the petitioner submits that if one objectively reads its campaign pronouncements, reflects on the characterization thereof by the trial examiner, and ponders the order to cease and desist, the conclusion is inescapable that the line in this case has been placed perilously close to leaving no room for the exercise of First Amendment rights.

C. Cease and Desist Orders.

The petitioner is not certain as to the content of the cease and desist order. The Court below modified the notice to be posted, and apparently intended that the cease and desist order be in like manner amended.

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[25]Bok, *The Regulation of Campaign Tactics*, 78 HARV. L. REV. 38, 77, 141 (1964).

Perhaps in this area the guidelines are certain—if so, the petitioner submits they were ignored.

This Court has repeatedly said that the prohibition should fit the offense.[26] Here the Board has proposed and the court below adopted the broad order condemned by *Express Publishing*. The petitioner's conduct was limited to the dissemination of campaign literature. In a period of organizing activity continuing over a period of more than two years, no other unlawful practice was found. Does this activity demonstrate a proclivity to violate the law in general so as to call forth the broad injunctive sanction imposed? In the twenty-five year history compiled by the trial examiner without notice and on his own motion,[27] there was one alleged discriminatory discharge case and that dismissed for lack of proof; only two cases, other than that here, in which interrogations and threats were made; and only one case involving a refusal to bargain and that one in which the Board initially dismissed the complaint. Does this record reveal a flagrant violator of the law?

If so, there is no standard and *Express Publishing* is a myth.

As to the terms of a cease and desist order, this Court has intimated, though not directly held, that Rule 65 of the Rules of Civil Procedure is applicable.[28] It has further stated that cease and desist orders should be clear and precise in order that they may be under-

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[26]NLRB v. Express Publishing Co., 312 U.S. 426 (1941); Communications Workers of America v. NLRB, 362 U.S. 479 (1960).

[27]Appendix C, *infra*, pp. 93-98.

[28]Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13-14 (1945).

stood by those against whom directed.[29] It has said that in the area of First Amendments rights, an order must be couched in the narrowest terms and tailored as precisely as possible to the exact needs of the case;[30] that precision of regulation must be the touchstone.[31] It has pointed out that the judicial contempt power is a potent weapon and when founded upon a decree too vague to be understood, it can be a deadly one.[32] While the petitioner believes these pronouncements to be clear, it respectfully submits that it does not know and cannot reasonably ascertain the statements it must hereafter refrain from making—it appears that its right to speak has "directly or indirectly" been forever stilled.

If this order reflects proper application of standards, if a prohibition against, for example, "directly or indirectly making any threat or any inducement involving threat or the withholding of threat of economic harm . . ."[33] has meaning, if this Court is willing to place its imprimatur upon this order by denying certiorari and thus permitting similar Board action in like cases—there is no overriding standard, or supervision of application of standard, and an unbounded discretion is thereby vested in the Board.

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[29]FTC v. Cement Institute, 333 U.S. 683, 726 (1948).
[30]Carroll v. Commissioners of Princess Anne, 393 U.S. 175, 183-84 (1968).
[31]NAACP v. Button, 371 U.S. 415, 433, 438 (1963); Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967).
[32]International Longshoremen's Ass'n v. Philadelphia Maritime Trade Ass'n, 389 U.S. 64, 76 (1967).
[33]Appendix D, *infra*, p. 107.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the decree and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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May 4, 1970.

APPENDIX

APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

HENRY I. SIEGEL CO., INC., - - - - - *Petitioner,*

v. No. 18,821

NATIONAL LABOR RELATIONS BOARD, - - *Respondent.*

W. C. KEATON, Former Mayor of Hohenwald, Tennessee, - - - - - - - *Petitioner,*

v. No. 18,831

NATIONAL LABOR RELATIONS BOARD, - - *Respondent.*

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, - - - - - - - *Petitioner,*

v. No. 18,889

NATIONAL LABOR RELATIONS BOARD, - - *Respondent.*

Decided November 4, 1969.

ON PETITIONS FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before: WEICK, EDWARDS and COMBS, Circuit Judges.

COMBS, Circuit Judge. The Henry I. Siegel Co., Inc., and W. C. Keaton, former Mayor of Hohenwald, Tennes-

see, petition for review of the National Labor Relations Board's findings that they violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). The Amalgamated Clothing Workers of America ask that this Court direct modification of the Board's order and restore certain affirmative sanctions recommended by the Trial Examiner but not adopted by the Board. The Board cross-petitions for enforcement of its order. 172 N.L.R.B. No. 88.

In 1951, petitioner W. C. Keaton was elected Mayor of the Town of Hohenwald, Lewis County, Tennessee. The population of the town is approximately 3,000; Lewis County has a population of about 7,000. Keaton was re-elected without opposition until 1967. He was a strong mayor and throughout his term in office encouraged and promoted industrial expansion for his town and county. In fact, "[t]hat was the only reason [he] ran." In 1954, these efforts resulted in Henry I. Siegel Co., Inc., a manufacturer of men's clothing, agreeing to locate a new plant in Hohenwald. The company leased for a long term a building constructed with money from general obligation bonds issued by the town (40%) and the county (60%). The lease provided for rentals sufficient to retire the bonds.

The company apparently prospered in Hohenwald. There was no overt union activity until September, 1962. Activities by the Amalgamated Clothing Workers then took shape and finally resulted in the scheduling of a Board conducted election on April 9, 1965. The plant employed at that time approximately 400 persons, mostly women.

Mayor Keaton was ardent and vocal in his anti-union sentiments. He spoke against the union at a meeting of the Lewis County Civic Club; the text of his speech was that trade unions would be detrimental to economic growth, and business men were urged to stand up against the union. Shortly before the election, Keaton procured from

the company a list of names and addresses of company employees. He had often obtained similar lists for use in civic campaigns in which he was interested. On this occasion the list was furnished without question and Keaton volunteered no reason for wanting it. According to the mayor, they knew he needed it for a purpose in connection with trying to secure industry.

After obtaining the employee list, Keaton approached the publisher of the Lewis County Herald, the only local newspaper. He was aware of the publisher's anti-union sentiments and suggested that the newspaper take a stand on the upcoming election. The next issue of the Herald contained an anti-union editorial which read in part:

> "Now there are outsiders who have no interest in Lewis County, except the money that can be derived from industrial employees, who are seeking to unionize employees at the Henry I. Siegel Company. We understand the Amalgamated Clothing Workers of America are to hold an election in April.
>
> We fail to see how a union can benefit employees of the Henry I. Siegel Company, which pays among top salaries in the clothing industry, and has a $1 million annual payroll in Lewis County.
>
> **WE BELIEVE** a vote for the union would jeopardize the future industrial expansion of Lewis County.
>
> **We BELIEVE** you will not have as many dollars in your possession at the end of the year if the plant here is organized.
>
> We believe you will not work as much overtime, as you now enjoy.
>
> **WE BELIEVE** your fringe benefits will be no better, if as good, if your plant is organized.

WE BELIEVE there's a chance violence could erupt if the plant is organized, as has been the case in numerous other places in the state, and when it is over, we believe friendships, man's most important and cherished earthly possession would never be the same.

WE BELIEVE very few people in Hohenwald believe in this kind of actions.

WE BELIEVE, if you will think straight, rely solely on your own judgment, you will know you have nothing to gain by organizing the Henry I. Siegel Company.

• • •

FREE COPY

If you are one of the people this week that receives a free copy of the Herald, whether you are a resident of the County or work in the county, we urge you to examine it carefully and we would also invite you to become a weekly subscriber if you find it interesting."

Utilizing the employee list, Keaton had a copy of this issue of the Herald sent to all company employees.

On the day before the election, Keaton placed a two-page, three-column advertisement in the newspaper. The first column was headed "Yesterday" and recounted Hohenwald's progress in industrial employment and per capita income. The second column, captioned "Today," declared that "Hohenwald stands at the cross-roads." In this column Keaton discussed the reasons why he opposed the union. He suggested that nothing was to be gained by unionization, and continued:

"If nothing then is to be gained, what do our workers stand to lose?

(1) $10,000 to $15,000 per year in union dues.

(2) Possibly reduction in wages to those of the union.

(3) Possibly reduction of Insurance plans to those of the union.

(4) Liberty and freedom.

Can any union guarantee any improvement for our workers?

Certainly not—only promises.

Could the Company close the plant?

Certainly, see the Supreme Court ruling of last week."

The last column was entitled "Tomorrow" with a subtitle asking, "Is Hohenwald next for this?" This column contained reproductions of newspaper headlines, pictures, and stories of strike violence. One of the stories was in reference to the Supreme Court's decision in *Textile Workers* v. *Darlington Co.*, 380 U. S. 263 (1965), which upheld a company's right to go out of business after it was unionized. The mayor's advertisement is attached as "Appendix A"* to this opinion. Keaton had a copy of this issue of the Herald mailed to all company employees. He also obtained additional copies of the advertisement and caused them to be placed on cars in the company's parking lot and distributed in other public places in the town.

While Mayor Keaton was thus proclaiming his views, the company was mounting its own campaign against the union. Letters were mailed to the company's employees on March 31, April 6, and April 7. The March 31 letter was signed by Sam Siegel, company vice president, and read as follows:

"Dear Friends:

For the past eleven years, the Hohenwald plant has operated in peace and harmony. Friday morning,

*[Petitioner's note. Appendix deleted. See J.A., p. 21.]

April 9, you will have the opportunity to determine whether or not this will continue. This is a most serious decision, not only for you but for your loved one, relatives and all members of this community. The vote you cast in the election to be conducted by the National Labor Relations Board, may very well decide the future progress and industrial growth of this plant.

Therefore, in order for you to make the most intelligent decision, you must be informed of all the facts. The purpose of this letter is to place these facts before you—without prejudice—without influence. The decision will be yours alone.

THESE ARE THE FACTS.

We sincerely believe that the average hourly earnings in this plant are equal to or better than those of other garment plants in this area, union or non-union. We sincerely believe that your insurance benefits are equal to or better than those in other garment plants in this area, union or non-union.

We sincerely believe that your yearly take home pay is equal to or greater than those in other garment plants in this area, union or non-union.

To my knowledge no garment plant in this state works more regularly with more overtime opportunities than this plant.

We sincerely believe that your vacation benefits—your seniority rights—your paid holidays are comparable to those of other plants in this area, union or non-union.

The working conditions in the Hohenwald plant are the finest to be found. You work in a modern air conditioned factory which is equal in my opinion to any in this state.

THOSE ARE THE FACTS, SIMPLE, CONCISE AND CLEAR.

Union organizers can not present you with any facts. They only make promises. Their promises are entirely irresponsible. Irresponsible because they are in no position to assure you that they will be fulfilled. The union itself, no matter what they promise you CAN NOT SET PRODUCTION STANDARDS—CAN NOT CHANGE WORKING CONDITIONS—CAN NEITHER HIRE NOR FIRE—NOR MAKE ANY CHANGES WHATSOEVER IN PLANT OPERATIONS. The union can guarantee you nothing.

REMEMBER! ONLY THE COMPANY PROVIDES JOBS.
ONLY THE COMPANY PAYS INSURANCE BENEFITS.
ONLY THE COMPANY MAKES VACATION AND PAID HOLIDAYS POSSIBLE.

What can the union do? They can collect dues, levy fines and assessments. Control your actions as an employee. Call strikes.

Look around you in a neighboring community the results of union agitation are easy to be seen. Violence—loss of work—disruption of community relations—destruction of private property—a town divided. Do you want this for Hohenwald? I hope this letter has served its purpose to acquaint you with the facts so that you can make an intelligent decision. I urge you on Friday, April 9th, to vote for continued peace and harmony in this community; to vote for

future progress and industrial growth. This can be done by simply VOTING NO.

Sincerely yours,

(s) Sam Siegel"

The April 6 letter was also signed by Sam Siegel and read thus:

"Dear Friends:

The day of decision is fact approaching. Friday morning, you will vote if this plant is to be unionized. You will vote in the tried and true American way—by secret ballot. You will be alone in the voting booth. No one will ever know how you voted. The will of the majority will rule.

The importance of your vote can not be overemphasized. If you fail to vote you are letting someone else decide for you. This decision which may affect your industrial future is too important to leave to others. No matter what your sympathies—you owe it to yourself to express your opinion.

REMEMBER; YOU CAN VOTE AGAINST THE UNION WHETHER YOU SIGNED A UNION CARD OR NOT!! The mere signing of a union card is not binding. If any union organizer or union sympathizer told you that signing a cards means you must vote for the union, that statement is simply not true. You are a free agent. You can vote any way you see fit, under no obligation whatsoever.

Furthermore, if any union organizer told you that the union, itself, can arrange things so that you work less and get as much or more pay, that statement is simply not true. In the final analysis it is the company, alone that provides jobs, creates payrolls and bears the whole responsibility for the operation of this plant.

One thing is certain with a union comes dues, fines and assessments—and the possibility of strikes—violence and loss of work. The rest of the rosy picture the union paints is nothing but empty promises—that they do not have the power to guarantee.

There is only one realistic way to continue the past eleven years of progress in this plant. That is to do what you have been doing. The spirit of cooperation and harmony that you have exhibited during this long period has made the benefits that you receive possible.

In closing, let me repeat you must exercise your right to vote and by your absence not permit others to exercise it for you. A vote against the union will assure the continued progress of the plant and the spirit of cooperation and harmony that we have all enjoyed in the past. Friday morning—you owe it to yourself to VOTE NO.

Sincerely yours,

(s) Sam Siegel"

On April 7, Herbert Honick, plant manager sent a letter to all employees:

"LADIES—FELLOWS

It was my intention to remain silent and not pass any of my private thoughts on to you before the election tomorrow. But as election time draws near, I can't help but feel that I would be letting all of you down if I didn't mention something that is of utmost importance to you and me.

I need not spend time listing the wild promises you have received and then shooting holes through them—all of us know that baloney!

I am concerned with the possible loss of a wonderful privilege that we both enjoy—that of the two of us sitting down face to face—two free human beings, and

discussing our mutual problems. You know that now, as in the past, all it takes to see me is to walk into my office. Problems of all kinds are discussed—personal ones as well as those relating to work. No one has ever left my office without knowing that everything humanly possible would be done to solve these problems. These problems are resolved on a personal basis —not by a committee—not by filling out forms that are passed around from one person to another to be read on a certain day of the week.

The relationship, that we both know works, would end if a union is voted in tomorrow. I don't think you want this. You can express your desire for this kind of relationship to continue by voting NO tomorrow.

Sincerely,

(s) Herb
Herb Honick

P.S. If by any chance you need transportation in order to vote Friday call me at the factory phone number 796-3241 or my home phone, number 796-3203. I will see to it that you get a ride."

The day before the election Jesse Siegel, company president, spoke to assembled employees. He said in part:

"More than a decade ago this plant was opened. It was in many ways a cooperative venture between the people of Hohenwald and Lewis County and the Siegel Company. Your elected city and county officials agreed to raise the money through a bond issue and the Siegel Company agreed to sign a lease guaranteeing the payment of these bonds. We also agreed to provide employment to the fullest extent. Right from the

beginning, then—the opening of the Hohenwald plant was a kind of partnership between the people of this community, you included, and the Henry I. Siegel Company.

* * *

People are asking what will happen to the insurance plans they now have if the union is voted in? That is an unanswerable question. It will be a subject for negotiation. No one, union organizers included, can tell you now what the results will be, however I can tell you that the plan you now have will continue if the union is not voted in.

* * *

In the same way that this plant was a cooperative venture from the beginning—in all fairness I must vigorously proclaim that all the benefits I have enumerated could not have materialized without your cooperation.

* * *

This combination of less work and more money is at the heart of the union promise. I sometimes wonder if they think you have no intelligence at all, if they take you to be so foolish as to believe that they have the power to make this come true, when all the evidence tells an entirely different story.

Let's suppose that their wild promise could be realized—what would it mean. In our highly competitive industry, the ability to manufacture goods competitively is of prime importance if a plant is to operate successfully. There are hundreds of pants manufacturers throughout the country who would immediately be in a position to cut into your work. This kind of irresponsible promise reveals the short sightedness and shallow nature of the union's interest in the future of our plant. They feel you understand so

> little about the true situation that you will grab the bait without noticing the hook in it. In my opinion, if such a promise could come true it might well be the beginning of the end of the progress of the Hohenwald plant."

President Siegel then spoke of the violence which had occurred at other places after the union had come and told the employees "to look around you in your neighboring community, to see the destructive forces of unionism," where the city was "torn with strife, violence—law breaking—hostility between neighbors and loss of work." He asked the employees whether they wanted to "disturb the peace and harmony of this plant for the irresponsible promises of the union and the doubtful privilege of paying dues?" He concluded his talk by saying that "the decision tomorrow will be yours;" that the employees' decision would be respected by the company. He urged them to vote and then return to work in a spirit of good neighborliness.[1]

Upon these facts the Board found that the company and Keaton, acting as a company agent, had violated Section 8(a)(1) of the Act. It is stated in the order that the violation is attributed to him [Mayor Keaton] solely on the basis of his agency relationship with respondent Siegel. The company and Mayor Keaton are required by the Board's order to cease and desist from the unfair labor practices found and to post a notice for sixty days. The notice reads in relevant part:

> "WE WILL NOT directly or indirectly threaten any employee with plant shutdown, strikes, violence, job loss, discharge, reduction of overtime or of other work opportunities, . . .

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[1]The union lost the decision 223 to 159. The Board found employer misconduct and ordered a new election which, so far as is shown by the record, has not been held.

WE WILL NOT directly or indirectly threaten any employee that union membership is futile since no advantage would be derived therefrom . . .

WE WILL NOT directly or indirectly threaten, inform or advise any employee that in the event of unionization he will no longer be able to exercise the right to present individual grievances or complaints to or discuss mutual problems affecting his employment directly with his employer.

* * *

WE WILL NOT directly or indirectly threaten any employee that he will be better off and have more to gain by dealing with his employer individually instead of through a union.

WE WILL NOT directly or indirectly in other manner interfere with, restrain, or coerce, any employee in the exercise of his right to self-organization; . . ."

In addition to the sanctions ultimately adopted by the Board, the Trial Examiner recommended an order which would have given the union equal time with company officials to address employees at the plant; access to plant bulletin boards; and names and addresses of company employees. The recommended order would have required the company to post a notice for six months and to mail a copy of the notice to all employees; also to insert a double page advertisement of the notice in the Lewis County Herald. This advertisement also was to be mailed to all employees. It is these additional sanctions that the union seeks to have reinstated.

We are faced at the outset with the question whether there was substantial evidence to support the Board's finding that Mayor Keaton was acting as the agent of the company within the meaning of 29 U.S.C. § 152. An employer is defined in § 152(2) as any person acting as an agent of

an employer, directly or indirectly. Subsection (13) provides that the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. Within these guidelines, we are unable to avoid the conclusion that the mayor did act as agent of the employer. It is apparent from this record that Mayor Keaton, both as an individual and as an official of the town, had a vital interest in the success of Siegel's Hohenwald plant. He had sponsored the bond issue which provided the funds for construction of the plant and rental payments by the company were earmarked for retirement of the bonds. He was convinced—and we have no doubt about his good faith—that the coming of the union might endanger the plant's success. He was a personal friend of the company's vice president, Sam Siegel, and had visited with him through the years; both men belonged to the Lewis County Civic Club where the consequences of unionism was a topic of discussion. When the representation election was imminent, the mayor obtained from Sam Siegel a list of names and addresses of employees which he used to circularize the employees with the anti-union editorial and his own newspaper advertisement against the union. (The union's request for a voter eligibility list was refused.) The mayor had copies of the newspaper containing his advertisement distributed in the company parking lot the day before the election, shortly after the company president, Jesse Siegel, had spoken to the employees.

The approach taken in the newspaper editorial, in Sam Siegel's letters, in Jesse Siegel's speech, and in the mayor's advertisement was very similar. The only real difference was that the Siegels' utterances were somewhat more restrained. Following the representation election on April 9, Mayor Keaton went to the company's plant at the invitation of Sam Siegel to arrange for police to keep a lookout "in case there was any vandalism or anything around there." The employees of the plant in this small, closely

knit community, where any man's business is everybody's concern, could hardly believe that the mayor was acting entirely on his own without the knowledge and approval of company officials. The remarkable parallelism between the statements of the mayor and those of company officials could hardly be considered as mere coincidence. The company officials did nothing to disavow their responsibility for the mayor's actions but we do not reach the question of failure to disavow. If doubt remained about the company's approval of the mayor's actions, it was effectively removed by president Siegel's speech the day before the election. On two occasions during his talk, he told the employees that operation of the Hohenwald plant was a cooperative venture by the company and the town and county. At another point he said, "The opening of the Hohenwald plant was a kind of partnership between the people of this community, you included, and Henry I. Siegel Company." The employees knew, of course, that Keaton was the mayor and as such spoke for the town. It is a reasonable assumption, too, that they knew a partner has authority to speak for the partnership. Consequently, the employees had it from "the horse's mouth" that the town and the company were working in tandem for what they considered to be the best interest of the company. Clearly, the Board had before it substantial evidence from which to find the mayor acted as the company's agent within the meaning of the statute.

We look now to whether the activities of the company and the mayor when considered together were violative of Section 8(a)(1) of the Act. We hold they were. Section 8(c) of the Act gives an employer the right to express his opinion in opposition to the union, also the right to express argument in support of such opinion. But, his expressions may not contain a threat of reprisal. He may not dress up a threat in the language of opinion. Even though his statements may be expressions of opinion only, if their

reasonable tendency is coercive in effect, they are violative of Section 8(a)(1). *N.L.R.B.* v. *Kingsford*, 313 F. 2d 826 (6th Cir. 1963); *N.L.R.B.* v. *Ford*, 170 F. 2d 735 (6th Cir. 1948).

It is often difficult to determine whether statements of the employer are permissible forceful argument in opposition to the union or a veiled threat to the employees in the event the union should win the election. *Surprenant Manufacturing Company* v. *N.L.R.B.*, 341 F. 2d 756 (6th Cir. 1965). If the inference or conclusion found by the Board that the statements constitute a threat is a reasonable one, its findings will not be set aside on review even though a different inference or conclusion may seem more plausible. *Morse Instrument Company* v. *N.L.R.B.*, 388 F. 2d 1 (6th Cir. 1967); *Surprenant Manufacturing Company* v. *N.L.R.B., supra; N.L.R.B.* v. *Electric Steam Radiator Corporation*, 321 F. 2d 733 (6th Cir. 1963). In making its determination, the Board has the right to consider the total context within which the activities occur. *N.L.R.B.* v. *Sinclair Co.*, 397 F. 2d 157 (1st Cir. 1968); *Daniel Construction Company*, 341 F. 2d 805 (4th Cir. 1965). Moreover, the Board is justified in determining the question of coercion or threat of reprisal from the standpoint of employees over whom the employer has a measure of economic power. The fact that the town's largest employer and the mayor possess more economic power, comparatively, in a small community than in a large city is a proper subject for consideration. *Amalgamated Clothing Workers of America* v. *N.L.R.B.*, 371 F. 2d (D.C. Cir. 1966).

The statements which we have found are attributable to the company fall in the category of thinly veiled threats rather than mere predictions or legitimate argument in support of opinions. The mayor's statements are the most extreme. He states in plain words what company officials suggest more gingerly. He tells employees in language

which is more than merely an expression of opinion that they stand to lose by a possible reduction in wages and a possible reduction of insurance plans if they vote for the union.

We think the mayor's statement that the company could close the plant was an implied threat when considered in light of the statements of company officials. True, he cited the *Darlington* case and included in his advertisement a tear sheet from a newspaper containing a reporter's analysis of the Supreme Court opinion. However, we doubt if anyone, the mayor included, expected the employees of the Hohenwald plant to familiarize themselves with the *Darlington* opinion within the twenty-four hours which remained before the election.

The mayor's statements about strife and violence, when coupled with company officials' prediction of an end to the spirit of cooperation and harmony which might well be the beginning of the end of the progress of the Hohenwald plant, was an implied threat rather than an expression of opinion.

The letter of plant manager Herb Honick was on its face a threat that the personal relationship between him and the employees would cease if the union came in. His letter recited the benefits of such relationship and then concluded, "the relationship, that we both know works, would end if a union is voted in tomorrow." Also, that part of his letter in regard to employees not having the continuing right to present their problems in relation to work was inaccurate. Under Section 9(a) of the Act, any individual employee has the right to present grievances to the employer and have such grievances adjusted so long as the union is given an opportunity to be present and the adjustment does not violate the collective bargaining agreement.

Implicit in the mayor's statements and those of the company officials is the threat that, if the union came in, the

personal concern which the company had shown for its employees would be withdrawn and they would be left to fend for themselves in an atmosphere of strife and violence created by the union. The cumulative effect of their statements was more than a prediction or argument in support of an opinion.

The union argues with considerable force that the Board's order is not adequate and that the broad sanctions recommended by the Trial Examiner should have been adopted. We are reminded that the Siegel Company has been found guilty of unfair labor practices at one or more of its plants on numerous occasions in the past. 140 N.L.R.B. 1292 (1963); 143 N.L.R.B. 382 (1963), enforced 328 F. 2d 25 (2nd Cir. 1964); 147 N.L.R.B. No. 78 (1963), enforced 340 F. 2nd 309 (2nd Cir. 1965); 148 N.L.R.B. 1192 (1964); 165 N.L.R.B. No. 56 (1967). The repetitive pattern of the company's conduct is emphasized as justification for the unusual remedy recommended by the Trial Examiner. After careful consideration, we have concluded that we should not modify the Board's order so far as it applies to the Siegel Company. Under Section 10(c) of the Act, the Board has broad discretion to fashion appropriate remedies. *Fibreboard Corp.* v. *N.L.R.B.*, 379 U. S. 203, 216 (1964); *N.L.R.B.* v. *Seven-Up Co.*, 344 U. S. 344 (1953). We cannot say here as a matter of law that the Board should have imposed stronger sanctions.

The former mayor strongly contends that his statements were protected by the First Amendment to the Constitution, especially since he was a public official when the statements were made. We do not consider it necessary to go into that question since the Board makes it clear that its order applies to Keaton only as an agent of the company. It is not often that a public official is named as respondent in a proceeding before the National Labor Relations Board but there is precedent for such action—Dean Industries, Inc.,

and Howard Stafford, Mayor of Pontotoc, Mississippi, 162 N.L.R.B. 106. Moreover 29 U.S.C. § 152(2) includes within its definition of employer any person acting as an agent of an employer.

We are concerned about the legal propriety of that part of the Board's order which requires affirmative action by former Mayor Keaton. He is now a private citizen and is named in the order only because the Board found he acted as the company's agent. This being so, there is no reason why notice to the company's employees should be signed by Keaton and no reason why he should be required to sign a notice to the Regional Director. Notice by the corporation will necessarily include all those acting as agents for the corporation. If this shoe fits Keaton, he will be included. The order will be modified so as not to require affirmative action by W. C. Keaton.

We are also of the opinion that the second and fifth paragraphs of the notice attached to the Board's order are too broad. Those paragraphs read:

> "WE WILL NOT directly or indirectly threaten any employee that union membership is futile since no advantage or benefit would be derived therefrom which would not be derived in the absence thereof.
>
> "WE WILL NOT directly or indirectly threaten any employee that he will be better off and have more to gain by dealing with his employer individually instead of through a union."

The foregoing language comes perilously close to infringing upon the First Amendment rights of the parties. Aside from that, such sweeping language is not needed to accomplish the purpose of the Act. The second and fifth paragraphs (set out above) will be eliminated from the notice and the following language substituted therefor:

"WE WILL NOT directly or indirectly threaten any employee with loss of economic benefits or changes in working conditions as a result of his joining a union."

The Board's order will be modified as herein directed and as so modified will be enforced.

WEICK, Circuit Judge, dissenting. In my judgment, there is not substantial evidence from which the Board could find that W. C. Keaton, former Mayor of Hohenwald, acted as the agent of the Company.

None of the facts relied upon by the majority or the Board is, in my opinion, sufficient, considered separately or in totality, to justify the finding that Mayor W. C. Keaton acted as an agent for the Company. Instead, the facts convey the clear conclusion that Mayor W. C. Keaton acted to protect what in his view was the best interest of Hohenwald and its people whom he represented. The Board's order erroneously finds that the Mayor was representing the Company instead of his own community.

The majority view that Keaton acted as the Company's agent is based upon findings of the Board that he and Sam Siegel were friends; that Keaton obtained a list of the names and addresses of the employees from the Company; that he had copies of the newspaper editorial and his advertisement circularized to plant employees; that a parallelism existed between the Mayor's and the Company's statements; that the Company told its employees what was common knoweldge, *i.e.*, that the plant was a cooperative venture of the Company and the town and county.

Keaton had been the driving force for industrialization of the Hohenwald area. His statements at the Civic Club meeting in February, 1963, indicate his view that the only way Hohenwald could attract industry was to keep organized labor out of the area. Thus, Keaton was interested in opposing unionization of the plant because he felt that it would destroy Hohenwald's ability to attract industry. In

point of fact, the need to attract industry was the "only" reason he ran for mayor.

Pursuant to Keaton's interest in attracting industry, he helped negotiate with the Company a 20-year lease-purchase contract which provided municipally subsidized financing for the construction of the Company's factory. As a result of this activity, Keaton and Sam Siegel became good friends.

The Board concedes in its Brief that Keaton "customarily received information about the plant's industrial make-up whenever he wished. . . ."

The Company asked no questions and was given no reason for Keaton's request for the list of employees. There is no evidence whatever that the Company knew Keaton's purpose in obtaining the list. Nor is there any evidence that the Company was aware of the content of either the editorial or the advertisement prior to their publication. On the contrary, the uncontradicted evidence indicates that Keaton prepared and paid for the advertisement and for its distribution and that of the editorial.

Under such circumstances and in view of the fact that the advertisement was signed by Keaton, it would be unreasonable to require the Company to disavow what the Mayor did and said.

The uncontradicted proof is that Keaton acted independently of the Company for what he considered to be the best interest of his community. So far as this record indicates, he never revealed his plans to the Company. The execution of those plans and the cost thereof were his own. The Company initiated nothing and it encouraged nothing. The Company in this case is held liable for Keaton's action simply because it happens to have been beneficial to the Company in its attempt to avoid unionization. Certainly the Company was not obligated to disavow the statements of a public official simply because his statements happened to coincide with the Company's view of its own interest.

Nor should it be held that a public official can not freely express his views on matters of public interest when those views are his own and are not the result of solicitation by or connivance with the party in whose favor they are made.

Although Keaton may have been mistaken in his belief of what was best for the community, and even though the Company may have benefited indirectly from his statements, Keaton did not purport or intend to act for the Company. Even under the Act's relaxed agency requirements, this record is devoid of evidence sufficient to show an agency relationship between Keaton and the Company. The Act cannot, however, relax the First Amendment rights of a public official to free speech. *Cf., Garrison* v. *Louisiana,* 379 U. S. 64 (1964). Nor are these constitutional rights lessened because the Board has labeled the Mayor an agent of the Company.

The other matter which in my judgment is wholly wrong, is the Board's order insofar as it pertains to Keaton. The Trial Examiner recommended an order requiring the Company and Keaton as Mayor to cease and desist from the unfair labor practices found, and from interfering with, restraining or coercing employees in the exercise of their Section 7 rights. The Board's order, however, is against the Company and Keaton as *former* Mayor, since his term of office as Mayor had expired. Apparently Keaton is now being penalized as an individual for what he did and said in his capacity as Mayor and without any finding that after his term of office as Mayor had expired he continued individually to act as agent for the Company. In my opinion, the Board is without power to impose consequences on an individual in his later life for what he did in his capacity as a public official.

The Board's finding against the Company is premised on the combined activities of Company agents and of Mayor Keaton.

I would deny enforcement of the order of the Board against Keaton and remand to the Board for consideration of the sufficiency of the evidence to support a finding of an unfair labor practice against the Company without regard to Mayor Keaton's activities.

APPENDIX B.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

HENRY I. SIEGEL CO., INC. and W. C. KEATON, Former Mayor of Hohenwald, Tennessee,[1] and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO	Case No. 26-CA-2081

DECISION AND ORDER.

On December 29, 1967, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that Respondents had engaged in and were engaging in certain unfair labor practices within the mean-

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[1]The record discloses that Respondent Keaton is no longer mayor of Hohenwald, Tennessee, his term of office having expired on or about May 8, 1967. Thus we grant Respondent Keaton's motion to amend the caption of this case by inserting after his name and before the phrase "Mayor of Hohenwald, Tennessee" the word "Former."

We also amend the Trial Examiner's Recommended Order to include Respondent Keaton only as former mayor of Hohenwald and delete any reference to his agents and successors.

ing of the National Labor Relations Act, as amended, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, both Respondents filed exceptions to the Decision and supporting briefs. The Charging Party filed cross-exceptions to the Remedy portion of the Trial Examiner's Decision and a supporting brief. Respondent Siegel filed a motion to strike the cross-exceptions of Charging Party and Charging Party filed an opposition to Respondent Siegel's motion to strike.

Pursuant to Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions, the briefs,[2] and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified herein:

We agree with the Trial Examiner that Respondent Siegel, both through its own executives and through Mayor Keaton,[3] violated Section 8(a)(1) of the Act. We also agree with the Trial Examiner that Mayor Keaton himself violated Section 8(a)(1) of the Act by his activities. We wish to make it quite clear, however, that the violation is attributed to him solely on the basis of his agency relationship with Respondent Siegel.

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[2]Assuming *arguendo* that the Charging Party's cross-exceptions were timely filed, we find them to be without merit.

[3]Cf., *N.L.R.B.* v. *Lake Butler Apparel Company*, 392 F. 2d 76 (C.A. 5).

ORDER[4]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as herein modified, and hereby orders that the Respondent, Henry I. Siegel Co., Inc., and its officers, agents, successors, and assigns, and Respondent W. C. Keaton, former Mayor of Hohenwald, Tennessee, shall take the action set forth in the Trial Examiner's Recommended Order, as modified below.

Section 1(b) of the Trial Examiner's Recommended Order is hereby deleted in its entirety and the following substituted:

"b. Take the following affirmative action necessary to effectuate the policies of the Act:

(1) Respondent Siegel shall post in its factory in Hohenwald, Tennessee, copies of the Notice attached hereto marked "Appendix B".[5] Copies of said Notice, on forms provided by the Regional Director for Region 26, shall, after being duly signed by said Respondent's authorized representative, be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

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[4]It is our opinion that this case does not warrant the unusual remedy recommended by the Trial Examiner. Accordingly, we will adopt the Trial Examiner's Recommended Order only to the extent it is consistent with the following modifications. Furthermore, we will delete the Trial Examiner's Proposed Notice, marked "Appendix B," and substitute a notice which we believe to constitute a more appropriate remedy for the unfair labor practices involved. In so doing we do not intend to imply that the unfair labor practices involved are not aggravated, but only that the Recommended Order of the Trial Examiner is not appropriate.

[5]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order", the words "a Decree of the United States Court of Appeals Enforcing an Order."

posted. Reasonable steps shall be taken by said Respondent to insure that said Notices are not altered, defaced, or covered by any other material."

(2) Respondents, jointly and severally, shall notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C., July 1, 1968.

John H. Fanning, Member

Gerald A. Brown, Member

Sam Zagoria, Member

(Seal) National Labor Relations Board

APPENDIX B

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not directly or indirectly threaten any employee with plant shutdown, strikes, violence, job loss, discharge, reduction of overtime or of other work opportunities, loss or jeopardization of existing job benefits, loss of future employment opportunities through failure of other industries to locate or remain in this area, community disruption or disintegration, hazard or danger to family well-being, or any other economic harm, loss, detriment, disadvantage, reprisal or retaliation, in the event of unionization or because of other lawful organizational membership, affiliation,

sympathy, support, assistance or activity, or for engaging or attempting to engage in the right to bargain collectively or exercise or attempt to exercise any other right under the National Labor Relations Act, as amended.

We Will Not directly or indirectly threaten any employee that union membership is futile since no advantage or benefit would be derived therefrom which would not be derived in the absence thereof.

We Will Not directly or indirectly threaten, inform, or advise any employee that in the event of unionization he will no longer be able to exercise the right to present individual grievances or complaints to or discuss mutual problems affecting his employment directly with his employer.

We Will Not directly or indirectly make any threat or any inducement involving threat or the withholding of threat of economic harm, to any employee or employee's family, so as to procure or attempt to procure any employee to deal with his employer individually instead of bargaining collectively.

We Will Not directly or indirectly interfere with, restrain, coerce, or threaten any employee in the exercise of his right to select, elect, designate, be represented by, or bargain collectively through any labor organization of the employees' choice.

We Will Not directly or indirectly threaten any employee that he will be better off and have more to gain by dealing with his employer individually instead of through a union.

We Will Not directly or indirectly in any other manner interfere with, restrain, or coerce, any employee in the exercise of his right to self-organization; to form, join, or assist any labor organization; to bargain collectively

through representatives of his own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

All employees are free to join or not to join Amalgamated Clothing Workers of America, AFL-CIO, or any other Union, as employees see fit, without any threats, interference, restraint, or coercion from us or either of us in any way, shape, or form.

Henry I. Siegel Co., Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

W. C. Keaton, former mayor
Dated..... of Hohenwald, Tennessee

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103 (Tel. No. 534-3171).

APPENDIX C.

TRIAL EXAMINER'S DECISION.

I.

Preliminary Statement.

This case was heard before me in the Lewis County, Tennessee, Courthouse, at Hohenwald, Tennessee, on June 29 and September 11-13, 1967, upon pleadings consisting of a complaint of General Counsel of the National Labor

Relations Board, issued through the Board's Twenty-sixth Regional Director on April 14 and answer of Respondent Siegel (Employer) dated April 18 and of Respondent Keaton dated April 20, 1967, arising out of a charge filed by the above Union on April 14, 1965. Although the charge lists violations of Section 8(a)(1) and (5), the complaint is limited to allegations of violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.* ("Act"), as will be detailed.

All parties appeared and were represented throughout by counsel[1], who have fully availed themselves of opportunities afforded to present evidence and contentions, propose findings and conclusions, and file briefs. Briefs were received from the parties around November 28, 1967.

The evidence and the parties' contentions having been carefully considered, upon the entire record[2] and my observation of the witnesses I make the following:—

FINDINGS AND CONCLUSIONS.

II.

Jurisdiction.

At all material times, Respondent Henry I. Siegel Co., Inc. ("Siegel," "Employer") has been and is a New York corporation qualified to do business in the State of Tennessee and having a place of business consisting of a factory in Hohenwald, Tennessee, where it has been engaged in manufacture of men's clothing. During the 12-month representative period immediately preceding issuance of the complaint, said Respondent in the course and conduct of its said operations received at its Hohenwald plant, directly from outside of Tennessee, goods valued at over $50,000, and during the same period shipped from its said

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[1]Respondent Keaton, an attorney, appeared on his own behalf.

[2]Transcript as corrected by trial examiner's November 17, 1967 order on notice.

plant, directly to places outside of Tennessee, finished products of like value. I find that at all material times said Respondent has been and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

At all material times, Respondent Keaton has been mayor of Hohenwald, Tennessee, until on or about May 8, 1967, when his term of office expired.

At all material times, Amalgamated Clothing Workers of America, AFL-CIO (Charging Party, "Union") has been and is a labor organization within the meaning of Section 2(5) of the Act.

I find that assertion of jurisdiction in this proceeding is proper.

III.

Alleged Unfair Labor Practices.

A. Issues.

The issues presented are whether Respondent Employer violated Section 8(a)(1) of the Act through warning its employees in various ways of dire consequences (including loss of existing economic benefits and work, strikes, violence, plant closure, and community deterioration) as well as futility of selection of the Union as the employees' bargaining representative; and whether Respondent Keaton (mayor of Hohenwald) participated in and assisted such actions by circulating among employees printed material to that effect.

B. Background.

Hohenwald is a small Tennessee community whose population is said by its former mayor to have risen from about 1700 in 1951 to over 3100 in 1965, with an increase during that period of industrially employed from 225 (excluding lumbering) to 1300. In 1954, a 20-year lease-pur-

chase agreement had been entered into between Respondent Siegel, the City of Hohenwald, and Lewis County, Tennessee, involving construction of a factory building to be occupied by Siegel in Hohenwald. Financing for the construction was through issuance by the City of Hohenwald (40%) and Lewis County (60%) of general obligation bonds ($200,000) and industrial revenue bonds ($100,000) pursuant to 1951 enabling legislation of the State of Tennessee. The 1954 agreement was executed by Respondent Keaton on behalf of the City of Hohenwald and by Respondent Employer's Vice President Sam Siegel (as well as by a Lewis County official). Undoubtedly the municipally subsidized construction of this factory building for Respondent Siegel had much to do with the subsequent development of the community. At the times here primarily material, since the beginning of 1965, Respondent Siegel has employed a sewing machine operator force of approximately 400, predominantly women, at its Hohenwald men's clothing factory, which has always been operated as a nonunion enterprise. It was the efforts to unionize the plant and bargain collectively with Siegel in early 1965 which culminated in the present proceeding. Specifically, the campaign to unionize Siegel's Hohenwald operators finally resulted in a Union recognitional-bargaining request and an employer refusal to recognize or bargain, in January, 1965. In view of a Union offer of proof (described below), not objected to by Respondents but rejected by the trial examiner for reasons to be detailed, it is assumed for purposes of this proceeding that the Union's January, 1965 recognitional-bargaining request was a continuing one and that with respect thereto the Union did in fact hold unequivocal, unambiguous and otherwise valid collective bargaining representative designation cards duly signed by *precisely 50%* of Respondent's Hohenwald plant

employees in a conventional production and maintenance unit appropriate[3] for bargaining purposes.

The election conducted under Board auspices on April 9, 1965[4] was lost by the Union by vote of 223 to 159.[5] The Union filed objections to Employer misconduct allegedly affecting the election result. By its order of June 28, 1966, the Board determined that in view of Employer preelection misconduct consisting of actions here at bar alleged to have constituted unfair labor practices, the election should be set aside and reconducted when conditions allow. Notwithstanding the passage of more than 2½ years since the election and over a year since the Board decision, no reelection has yet been held.

Involved in the actions here for consideration are Respondent's President Jesse S. Siegel, Vice President Sam Siegel (Jesse's uncle), and Plant Manager Herbert Honick; as well as Hohenwald's former Mayor Keaton.

C. Alleged Interference, Restraint, and Coercion.

(1) March 31 and April 6 Actions of Respondent Employer's Vice President Sam Siegel.

The complaint alleges that on or about March 31 and April 6, 1965 Respondent Siegel through letters to em-

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[3]In his March 9, 1965 Decision and Direction of Election, the Twenty-sixth Regional Director found such unit appropriate.

[4]The Board Decision (Case No. 26-RM-179) of June 28, 1966 appears to be in error in stating this election took place on April 8, 1965. Decision was reserved at the instant hearing upon Respondent Employer's objection to the Charging Party's application (unopposed by General Counsel) to take official notice of that proceeding and receive in evidence that decision. The objection is hereby overruled and the decision received as Charging Party's Exhibit 1.

[5]The same Board decision of June 28, 1966 appears to be in further error in stating (p. 1, fn. 1) that of the 387 ballots cast, "159 were for, 382 were against, the Union." The Regional Director's June 23, 1965 Supplemental Decision and Direction of Second Election states that of the 387 ballots cast (of a total of approximately 395 eligibles), 159 were for and 223 against the Union.

ployees from its Vice President Sam Siegel warned employees that selection of the Union as bargaining representative would be futile, and would be attended by disruption of community relations and detriment to community industrial growth, as well as the probability of strikes, violence, and loss of work.

It is conceded that Respondent Employer distributed to all of its employees, in person or by mail, on March 31 and April 6, 1965, letters of its Vice President Sam Siegel which form the basis for these allegations. Respondent, however, denies that either of the letters says or means what is alleged in the complaint; defending on the further ground that the letters were lawful under Section 8(c) of the Act and in proper exercise of the "free speech" guarantee of the First Amendment of the United States Constitution.

It is undisputed that on March 31, 1965 Respondent Employer, through its Vice President Sam Siegel wrote and distributed in person or by mail to all of its Hohenwald employees a 2-page letter, on letterhead of H-I-S Sportswear Division of Henry I. Siegel Co., Inc., New York Office, 16 East 34th Street, N. Y. The letter *(GC Exh. 2C)*, dated at Bruceton, Tennessee, and addressed "Dear Friends," states:

> "For the past eleven years, the Hohenwald plant has operated in peace and harmony. Friday morning, April 9, you will have the opportunity to determine whether or not this will continue. This is a most serious decision, not only for you but for your loved ones, relatives and all members of this community. The vote you cast in the election to be conducted by the National Labor Relations Board, may very well decide the future progress and industrial growth of this plant.

"Therefore, in order for you to make the most intelligent decision, you must be informed of all the facts. The purpose of this letter is to place these facts before you—without prejudice—without influence. The decision will be yours alone.

"THESE ARE THE FACTS

[There follow a series of statements purportedly describing the economic advantages enjoyed by workers at Respondent Siegel's factory—including good wages, insurance benefits, overtime, vacations, and unsurpassed modern working conditions.]

"THOSE ARE THE FACTS, SIMPLE, CONCISE AND CLEAR.

"Union organizers cannot present you with any facts. They can only make promises. Their promises are entirely irresponsible. Irresponsible because they are in no position to assure you that they will be fulfilled. The union itself, no matter what they promise you *CAN NOT SET PRODUCTION STANDARDS—CAN NOT CHANGE WORKING CONDITIONS—CAN NEITHER HIRE NOR FIRE—NOR MAKE ANY CHANGES WHATSOEVER IN PLANT OPERATIONS.* The union can guarantee you nothing.

"REMEMBER! ONLY THE COMPANY PROVIDES JOBS.
ONLY THE COMPANY PAYS INSURANCE BENEFITS.
ONLY THE COMPANY MAKES VACATIONS AND PAID HOLIDAYS POSSIBLE.

"What can the union do? They can collect dues, levy fines and assessments. Control your actions as an employee. Call strikes.

"Look around you in a neighboring community the results of union agitation are easy to be seen. Violence —loss of work—disruption of community relations—destruction of private property—a town divided. Do you want this for Hohenwald? I hope this letter has served its purpose to acquaint you with the facts so that you can make an intelligent decision. I urge you on Friday, April 9th, to vote for continued peace and harmony in this community; to vote for future progress and industrial growth. This can be done by simply *VOTING NO.*

Sincerely yours,

Sam Siegel."

It is also undisputed that a week later, on April 6, 1965, 3 days before the election, Respondent Employer, through its Vice President Sam Siegel, distributed to all of its Hohenwald employees, in person or by mail, a further 2-page letter *(GC Exh. 2D)* on the same letterhead, again addressed to them as "Dear Friends," pointing out that "The day of decision is fast approaching" and urging them to vote since "The importance of your vote can not be over emphasized." The letter stresses in capitalized letters that employees can vote against the Union even if they signed Union cards. After indicating emphatically by underlining that the Union "itself" cannot "arrange things so that you work less and get as much or more pay," the letter goes on to say:

"One thing is certain with a union comes dues, fines, and assessments—and the possibility of strikes—violence and loss of work. The rest of the rosy picture the union paints is nothing but empty promises—that they do not have the power to guarantee.

"There is only one realistic way to continue the past eleven years of progress in this plant. That is to

do what you have been doing. The spirit of cooperation and harmony that you have exhibited during this long period has made the benefits that you receive possible.

"In closing, let me repeat you must exercise your right to vote and by your absence not permit others to exercise it for you. A vote against the union will assure the continued progress of the plant and the spirit of cooperation and harmony that we have all enjoyed in the past. Friday morning—you owe it to yourself to *VOTE NO.*

Sincerely yours,

Sam Siegel"

(2) April 7 Action of Respondent Employer's Plant Manager Honick.

The complaint also alleges that on or about April 7, 1965 Respondent Siegel through a letter to employees from its Plant Manager Herbert Honick warned them that selection of the Union as bargaining representative would result in withdrawal of personal relationships so as in essence to prevent or impair effective resolution of employees' problems.

Respondent Siegel's defenses to these allegations are the same as those already described relating to Sam Siegel.

It is undisputed that on April 7, 1965, 2 days before the election, another letter on Respondent Employer's letterhead, this time dated at Hohenwald and signed "Herb" by Siegel's Plant Manager Herbert Honick was distributed to all employee in person or by mail. This letter *(GC Exh. 2E)*, after an introduction to the effect that the writer was impelled to break his silence by his reluctance to "be letting all of you down" by not speaking out, dismisses "the wild promises you have received" as "baloney." It then goes on to state:—

"I am concerned with the possible loss of a wonderful privilege that we both enjoy—that of the two of us sitting down face to face—two free human beings, and discussing our mutual problems. You know that now, as in the past, all it takes to see me is to walk into my office. Problems of all kinds are discussed—personal ones as well as those relating to work. No one has ever left my office without knowing that everything humanly possible would be done to solve these problems. These problems are resolved on a personal basis—not by a committee—not by filling out forms that are passed around from one person to another to be read on a certain day of the week.

"The relationship, that we both know works, would end if a union is voted in tomorrow. I don't think you want this. You can express your desire for this kind of relationship to continue by voting *NO* tomorrow.

Sincerely,

/s/ Herb
Herb Honick"

"P.S. If by any chance you need transportation in order to vote Friday call me at the factory phone number 796-3241 or my home phone number 796-3203. I will see to it that you get a ride."

(3) April 8 Action of Respondent Employer's President Jesse Siegel.

The complaint further alleges that on or about April 8, 1965 Respondent Siegel through a speech to employees by its President Jesse S. Siegel warned employees that selection of the Union as their representative would be futile, would result in possible loss of existing benefits, plant closure or reduction of work opportunities, and in strikes and violence.

Respondent Siegel's defenses again dispute the construction placed upon what was said, and affirmatively set up its right to say what it did in the exercise of "free speech."

It is undisputed that between about 9 and 10 o'clock in the morning of April 8, 1965 (the day before the election commencing 11:00 a.m. on the following day[6]) Respondent's Hohenwald employees were assembled during working hours at the plant to listen to a speech by Respondent's President Jesse Siegel, who was introduced by his uncle, Respondent's Vice President Sam Siegel. The introductory (and closing) remarks of Sam Siegel and the main speech by Jesse Siegel were recorded and are undisputed. After an introduction by his uncle Sam, who recollected his nephew as a dirty-faced youngster who "always needed a nickel or dime to buy something, just like your kids need it," and who rose to the occasion and ultimately through his own ability became President after his father's death, Jesse Siegel told the employees *(GC Exh. 2F)*:—

> "I am the son of the founder of this company, Henry I. Siegel. At his death some sixteen years ago, the responsibilities of running this business were dropped into my hands. The trials and tribulations that are a natural part of this or any business often cause me to wonder if my inheritance was entirely a good thing. By and large the past sixteen years have been gratifying.
>
> "The Hohenwald plant hold a special place in my business career. For it marks the first new factory

[6]The rule enunciated by the Board in *Peerless Plywood Company*, 107 NLRB 427, forbids, upon penalty of setting an election aside, a preelection speech within 24 hours of a Board-conducted election. Sam Siegel's closing remarks *(GC Exh. 2F)* indicate these speeches were concluded at "ten o'clock." The Siegels' preelection speeches were thus delivered approximately 25 hours prior to the election.

that was opened during my administration. I had many doubts ten years ago that I would be able to successfully begin a new venture. The success, that has been achieved in Hohenwald quite frankly gave me the confidence I needed to go further in the expansion of this business. Hohenwald, then, marks a real milestone in my business career. I finally felt that I could continue in my father's footsteps.

* * *

"I sincerely feel that if I can convince you of the rightness of my views—then the future success of Hohenwald will be assured.

"All I ask of you is to hear me out. Consider carefully what I have to say and then make your own independent decision. Free of influence—free of prejudice.

"A wise man once said the only way we can learn what the future will bring is to study the past. A careful analysis of the history and development of this plant is the best means of predicting it's future.

"More than a decade ago this plant was opened. It was in many ways a cooperative venture between the people of Hohenwald and Lewis County and the Siegel Company. Your elected city and county officials agreed to raise the money to build the factory through a bond issue and the Siegel Company agreed to sign a lease guaranteeing the payment of these bonds. We also agreed to provide employment to the fullest extent. Right from the beginning, then—the opening of the Hohenwald plant was a kind of partnership between the people of this community, you included, and the Henry I. Siegel Company. It is not necessary to point out that no union had anything whatsoever to do with the inception of this new industry in Hohenwald. No union put up any of the

money, no union provided any of the employment. In fact, they were not on the scene at all.

"[Siegel then reviewed in detail the progress of the Company 'from an initial force of fifty to the present staff of more than four hundred,' the growth of earnings, the continuous employment, the employees' insurance coverages, and the total absence of union credit for any of the foregoing.]

"People are asking what will happen to the insurance plans they now have if the union is voted in? That is an unanswerable question. It will be a subject for negotiation. No one, union organizers included, can tell you now what the results will be, however I can tell you that the plan you now have will continue if the union is not voted in.

"[Siegel again referred to existing plant benefits—'job security and senority rights' and 'vacation benefits,' with a reminder of an upcoming September base pay increase and additional paid holiday.]

"In the same way that this plant was a cooperative venture from the beginning—in all fairness I must vigorously proclaim that all the benefits I have enumerated could not have materialized without your cooperation. * * * Truly—the spirit of industriousness, cooperation and harmonious action that you have so willingly evidenced since the start of this plant, have made it possible for these benefits to occur. Actually you alone have made all of this happen. I am confident that as long as this spirit continues the future progress of this plant is assured.

"I have spent some time now going over the benefits you have. Let us examine the promises the union so brazenly makes.

* * *

"This combination of less work and more money is at the heart of the union promise. I sometimes wonder if they think you have no intelligence at all, if they take you to be so foolish as to believe that they have the power to make this come true, when all the evidence tells an entirely different story.

"Let's suppose that their wild promise could be realized—what would it mean. In our highly competitive industry, the ability to manufacture goods competitively is of prime importance if a plant is to operate successfully. There are hundreds of pants manufacturers throughout the country who would immediately be in a position to cut into your work. This kind of irresponsible promise reveals the short sightedness and shallow nature of the union's interest in the future progress of our plant. They feel you understand so little about the true situation that you will grab the bait without noticing the hook in it. In my opinion, if such a promise could come true it might well be the beginning of the end of the progress of the Hohenwald plant.

"In the final analysis it is the company's responsibility to it's employees to make certain that they are getting every possible advantage—in forms of higher wages—insurance and other fringe benefits that are consistant with the continuing competitive position of the plant. • • • •

"People are asking, 'if the union is not voted in will engineers be back?' The answer to that question is simple. That engineering job is over and they will not be back. However, I do not mean to imply that your company will not continue to seek out ways of improving production in the future . . . I feel proud of the fact that the latest engineering program was able to raise earnings in this plant from 15 to 20%.

The company gained additional production. You got more money. The business was more competitive. The position of the company in the industry improved. Everyone benefited.

"Union organizers tell you that they are a responsible union—not a bunch of hoodlums. They tell you that they are a peaceful union. They do not tell the whole story. Less than six months ago this same union was engaged in a violent strike in another part of the state.[7] Not many years ago this union was involved in a protracted strike in a nearby community, Mt. Pleasant.[8] The result of both these strikes was that the plants closed and were later sold to other companies. In our own history with the union in 1946—a long, violent and destructive strike took place in our Dickson plant.[9]

"You have only to look around you in your neighboring community, to see the destructive forces of unionism. I am told that that city is torn with strife, violence—law breaking—hostility between neighbors and loss of work are paralyzing the community. There is no reason for this to happen in Hohenwald.

"This is an important decision which you will be making and you owe it to yourself, your family and the community to consider carefully what is best for you Will you disturb the peace and harmony of this plant for the irresponsible promises of the union and the doubtful privilege of paying dues? Will you turn over the right to act and think for yourself in exchange for control over all your actions as an employee of this plant? Will you risk strikes and violence to

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[7]No data have been supplied here regarding this.
[8]No data have been supplied here regarding this.
[9]A resumé of Board cases involving, among others, Siegel's Dickson, Tennessee, plant, may be found in *Table I, infra.*

satisfy a union whose primary interest is to feather its own next [sic]? The answer should be *obvious*!

"You have heard my views. I appreciate the attention and courtesy that you have so kindly afforded me. I am certain that if you consider carefully what I have had to say the rightness of my opinion will become clear.

"However, the decision tomorrow will be yours. That is the way it ought to be. Because you are the factory. It is your future and you can make it what you will.

"[Siegel assures the employees their decision will be "respected by the company" and urges them to vote and then 'return to work in a spirit of good neighborliness."]

"In conclusion let me extend my good wishes to you all—and let me urge you one more time to reject the union tomorrow and continue the progress of this plant and community. VOTE NO. Thank you very much."

Jesse Siegel's uncle Sam Siegel thereupon pointed out to the assembled employees that "It is ten o'clock now and as you know it's April 8th and I would appreciate it very much to turn the machines on one at a time. Don't turn them on at one time because the fuses will blow. Just one at a time start turning them on and let's go back to work and good luck. Thank you."

(4) April 1 and 8 Actions of Mayor Keaton

The complaint additionally alleges that on or about April 1 and 8, 1965, Respondent Siegel through distribution of a newspaper editorial (April 1) and a newspaper advertisement (April 8) to its employees by its agent Respondent Keaton, warned its employees that selection of

the Union as their bargaining representative would be futile and would result in possible loss of existing benefits, reduction in overtime work, plant closure, strikes, violence, and loss of employment opportunities through failure of other industries to locate in the area.

Respondents' defenses are again the same, except that, additionally, Keaton's agency and Siegel's responsibility for his actions are denied.

Called by General Counsel as a witness, *William Capelle Keaton, Sr.* testified that he was Mayor of Hohenwald from 1951 to May, 1967. It would seem, according to testimony of Keaton which I credit, that some 20 years ago, when he relocated in Hohenwald to start an insurance agency and practice law, industry being almost totally lacking in the area, he with others set about to attract industry to the community. Accordingly, a Civic Club was founded in 1946 or 1947, with himself as its first Secretary. A Country Club was also formed, of which he likewise was a charter member and at various times (including the present) President. In 1951 he was elected Mayor of Hohenwald on an industrialization platform—"That was the only reason I ran." Thereafter he was reelected and held office as mayor for 16 years without opposition. To launch the industrialization program, he designed and circulated throughout the United States a brochure to attract industries to locate in Lewis County. In these endeavors he was assisted by an informal local industrial development group. As a result of these efforts under his leadership, around 1954, for the first time in Tennessee history industrial bonds pledging the credit of local government were authorized and floated to finance or subsidize private industrial construction. This was accomplished with participation by two local banks, with a portion of the bond issue subsequently retired and acquired by the State of Tennessee. At about the same time (1954), Mayor Keaton was approached by Respondent

Siegel concerning the possibilities of similarly municipally-financed plant construction of a factory employing 300-400 workers. Ensuing negotiations apparently resulted in Siegel's assumption of obligations relating to the existing plant, which was to be enlarged to suit Siegel's specifications, through a further municipal bond issue, which appears to have been authorized by local vote following a campaign in which Mayor Keaton enlisted public support. A portion of the interest service cost of the first industrial bond issue of $200,000 was defrayed by the city and county.

Also testifying as General Counsel's witness, Curtis M. Barrow, the current Secretary of Lewis County Civic Club, described that club as "similar to the Chamber of Commerce," agreeing that "for practical purposes . . . the membership . . . consists of the businessmen in or near Hohenwald . . . including the Henry I. Siegel Company."[10] The club's expenses are defrayed by dues of its members (118 in 1965) as well as a horse show. Consistent with Mayor Keaton's testimony as to its purpose, the Civic Club appears to have maintained interest in local industrial development along approved lines. Thus, its minutes for February 25, 1963, show that Mayor Keaton reported to the Club[11] meeting on various matters, including a new hospital, expanded water system, and also a meeting that night to stimulate an "increase in the industrial bond";[12] further (*GC Exh. 3*):—

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[10]Although Barrow stated that "anyone can belong" who pays dues, Mayor Keaton later conceded that the percentage of workingmen members "would be very small" and he named none. Respondent's Vice President Sam Siegel and Plant Manager Herbert Honick are members.

[11]Civic Club Secretary Barrow explained that the Mayor of Hohenwald (who is also a member of the Club) "has regularly attended" the Club's meetings and as a regular feature reports on civic developments and progress.

[12]Mayor Keaton explained that this particular industrial bond was for the building of Lewis Products Company.

"Mayor Keaton announced that there would [be] a hearing of National Labor Relation Board on March 14.[12] All business men were encouraged and urged to stand up against the union.[12] It is the only way we can attract industry. It is the problem of the people of Lewis County and the city of Hohenwald.[12] If the people don't stand together we are through because we do not have location or resources to attract industry.[12] Industry is worried about organized labor and will not go where it is organized. Bob Beaver [†]. Reported that if plans went through the plant would be increased 109,000 sq. ft. and there would be from 80 to 160 more employees. This would give an increase in male jobs. The least take home pay per employee is $1.43 per hour. The plant average for the last 6 wks. was $1.61 per hour. The labor for the plant is excellent, but experience is needed."

In his testimony, Mayor Keaton acknowledged that at Civic Club meetings he has voiced opposition to union activity in Hohenwald and Lewis County because "I did not think they needed it," since "about the only asset we have here" is "fine people here who are native born people, who are trainable. . . . As far as fighting for these people here, I'll fight for them tomorrow and from now on to see that they are treated fairly. I didn't think that we needed anybody else to come in and see to their welfare. . . ." Although he at first denied knowledge of a unionizing campaign at the Siegel plant, he shortly thereafter conceded that he knew a union was trying to gain entry there "as soon as the plant came here."[13] He and Respondent's Vice

[13]Sam Siegel's loconic comment on this subject was, "The Amalgamated Clothing were engaged in organizing the Siegel Company for the last 20 years." According to Union West Tennessee Director Clearon A. Smith, the organizing campaign at the Siegel Hohenwald plant commenced around September, 1962.

President Sam Siegel are friends—"I have visited in his home for years and Mr. Siegel has visited in my home on many occasions." Sam Siegel also conceded that "It is well known . . . in the community that [I] and he [Mayor Keaton] are good friends." According to Siegel, he visits or speaks to Mayor Keaton most of the time when he comes to Hohenwald, perhaps averaging monthly, from his residence and office in Bruceton. Following the Board-conducted Union election on April 9, Mayor Keaton repaired to the Siegel plant at Sam Siegel's invitation to supply additional police patrols "in case there was any vandalism, or anything around there."

In March, 1965, shortly before the April 9 Union election at Siegel's Hohenwald factory, Siegel's Vice President Sam Siegel—according to his testimony—readily supplied Mayor Keaton, at the latter's request, with the names and addresses of Siegel's factory employees.[14] According to Siegel, he neither inquired nor did Keaton indicate the purpose of the list; in Siegel's words:

> "I didn't even think about it. . . . We are accustomed with city officials asking different things of the company to help them out to get industry . . . He [Mayor Keaton] wants to prove the point that we have so many people working and so many men would be available to go to work."

The weekly *Lewis County Herald* is the *only* locally published newspaper in Lewis County. At all times here material its editor (and, apparently, also owner), was and is Hulon O. Dunn, Mayor Keaton's nephew, whom Keaton was instrumental in relocating in Hohenwald and acquiring the

[14]It is noted that, according to the Board's June 28, 1966 decision, a similar request by the Union for a voters' eligibility list was refused by Siegel, resulting in a Union objection to the election which was subsequently sustained by the Regional Director.

newspaper. Knowing (according to Keaton's testimony) that Dunn's views were, the same as Keaton's, antiunion, Keaton suggested to Dunn that "it would be well if he would comment about the coming election at the Siegel plant." Dunn did so in an editorial in the April 1, 1965 issue, which—utilizing the list of employees received from Sam Siegel—Keaton distributed by mail to all Siegel employees. This editorial, thus distributed to those employees, states:

> "Remember when Hohenwald was a one-horse town with gravel streets, homes heated with wood, average income was $400.00 per family a year, upon graduation from high school or college young people had to seek employment out of the county and even out of the state? Why? Simply because there was no employment to be had in Lewis County.
>
> "But things have changed in the last few years. Now industry is here, the standard of living has risen to its highest point in the history of the county.
>
> "Why did industry come to Hohenwald? Because there was a bountiful labor supply, and because people in Lewis County were interested in seeing Hohenwald a better place to live, because some people in Lewis County wanted home folks to be able to find employment in Lewis County, and because some people in Lewis County did a heck of a lot of work and a good job selling Lewis County to industrial heads. These are but a few of the reasons we are now living 'higher on the hog' and our young people can find jobs when they become of job age.
>
> "Now there are outsiders who have no interest in Lewis County, except the money that can be derived from industrial employees, who are seeking to unionize employees at the Henry I. Siegel Company. We understand the Amalgamated Clothing Workers of America are to hold an election in April.

"We fail to see how a union can benefit employees of the Henry I. Seigel Company, which pays among top salaries in the clothing industry, and has a $1 million annual payroll in Lewis County.

"WE BELIEVE a vote for the union would jeopardize the future industrial expansion of Lewis County.

"WE BELIEVE you will not have as many dollars in your possession at the end of the year if the plant here is organized.

"We believe you will not work as much overtime, as you now enjoy.

"WE BELIEVE your fringe benefits will be no better, if as good, if your plant is organized.

"WE BELIEVE there's a chance violence could erupt if the plant is organized, as has been the case in numerous other places in the state, and when it is over, we believe friendships, man's most important and cherished earthly possession would never be the same.

"WE BELIEVE very few people in Hohenwald believe in this kind of actions.

"WE BELIEVE, if you will think straight, rely solely on your own judgment, you will know you have nothing to gain by organizing the Henry I. Siegel Company.

* * *

"FREE COPY

"If you are one of the people this week that receives a free copy of the Herald, whether you are a resident of the County or work in the county, we urge you to examine it carefully and we would also invite you to become a weekly subscriber if you find it interesting."

Thereafter Mayor Keaton, according to his testimony, personally designed and prepared the copy for,[15] and inserted and personally paid for, a full double-page notice or advertisement which appeared in the *Lewis County Herald* of April 8, 1965 (curiously, one side of the advertisement—upper left corner—bears the date April 1), the day before the election. Further according to Mayor Keaton's testimony, he also at his own personal expense had this issue of the newspaper mailed to all Siegel employees;[16] and, still further, at his own personal expense, he "employed some boys" to distribute copies of this double-page spread not only in the automobiles in the Siegel plant parking lot—including those of executives there—but also in "cars all over town" and in "the rest of the plants and on the streets uptown" as well as probably in residences. Mayor Keaton avers he has never in any way been reimbursed, and that he does not expect reimbursement,[17] for any of these alleged out-of-pocket expenses, estimated by him at $300 which he claims to have paid to his newspaperman nephew.

This double-page standard-size newspaper spread (*GC Exh. 2B*) is contained within an overall heavy black border

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[15]Keaton insisted that not only did he personally prepare the copy, but also the photographed "cuts" from other papers, including one dealing with the Supreme Court's *Darlington* case decision, which he allegedly had on hand in a personal clippings file. In response to questions by counsel for Respondent Siegel, Keaton denied that Siegel had any prior knowledge as to the *"content"* of this notice or advertisement. Keaton also testified that he was unable to "recall any conversation with them [i.e., Sam Siegel and Honick] that I was writing an article to be published in the paper." Sam Siegel and Honick denied knowledge of it, as well as of the April 1 editorial, before appearing in the paper. Keaton also testified that when he was at the Siegel plant office on the day following the April 8 notice—that is, on April 9, election day—comment there in the office, probably by Sam Siegel, "certainly wasn't unfavorable."

[16]There were thus some 800 mailings (i.e., 400 of the April 1 issue and 400 of the April 8 issue) to employees.

[17]Sam Siegel testified, with regard to whether he had asked Keaton the cost or who had paid for it, "I don't recall asking him that question."

and is headed, in large dark print, with three columns underneath also in large dark print:—

"HOHENWALD, LEWIS COUNTY, TENNESSEE, U. S. A.
Yesterday Today Tomorrow."

At the bottom it is subscribed, "W. C. KEATON, Mayor."

The *"Yesterday"* column is apparently intended as an accurate review of the past. The first entry is "1941—'John Just Left Town for Dee-troit.'" The ensuing items refer to 1951, 1958, and 1964, showing, among other things, an increase in industrial employment (lumbering apparently excluded only for year 1951) from 225 to 1300, population from 1700 to 3134 (March, 1965 for this item), retail businesses from 75 to 135,[18] and rise in *per capita* income from $679.00 to $2200.

The *"Today"* column, presumably intended as a factual overview of the existing situation—it starts out by stating, "We hope to point out facts—NOT FICTION"—is subheaded in heavy print: "Today Hohenwald stands at the cross-roads. What cross-roads?" After pointing out that the column's author (the Mayor) may through this expression be "lay[ing] ourselves, our families, and our property open to physical attack, and distruction [sic] . . . but—if this be true then such is our destiny . . .," and implying that Hohenwald will continue to prosper "if all things are equal", Mayor Keaton's *"Today"* column goes on to state:—

> "Let's get down to brass tacks, get our heads out of the sand, be honest with ourselves, think about the future and the welfare of Not Only Ourselves But Of Our Children and Our Neighbors Children.
>
> "What Do We Stand To Gain if the Henry I. Seigel Co. plant is organized?

[18] "During the period 1958 to 1963 retail sales increased 199 per cent. The next largest increase of any county in the state was 83 per cent."

"Do the workers in the two plants of the Seigel Co. which are organized receive better wages, better insurance plans and fringe benefits, more regular work, more overtime, more take home pay than the Hohenwald plant?

"Why don't we do some honest checking and find out. I don't believe those workers are in as good a position as are ours.

"If nothing then is to be gained, what do our workers stand to lose?

"(1) $10,000 to $15,000 per year in union dues.

(2) Possibly reduction in wages to those of the union.

(3) Possibly reduction of Insurance plans to those of the union.

(4) Liberty and freedom.

Can any union guarantee any improvement for our workers?

Certainly not—only promises.

Could the Company close the plant?

Certainly, see the Supreme Court ruling of last week.

"Do we want strife in Our Town such as we read about (not in New York or Chicago) in our neighboring towns? Why not talk to some of the people in Lawrenceburg where neighbor no longer speak to neighbor and neighbor may have his barn burned.

"Do you honestly believe union organizers are here from all over because they have friends or relatives here they want help?

"Could it be they are only here because it is their means of earning a living, a business with them, a way of life, to collect dues to pay their salaries? Or are

they here because they love us so much they want to help us—Do you Honestly Believe This?

"I sincerely believe our people will consider all sides of the matter and when this is done will say to the Outsiders—Go home, we are capable of seeing after our own affairs."

"Sincerely,

W. C. Keaton, Mayor"

The *"Tomorrow"* column of Mayor Keaton's double-page spread is headed by a dark "?" followed by the words, "is Hohenwald next for this?" The column, consisting of news clippings and photographs, is apparently designed to portray an accurate official Mayoral prognostication of things to come in Hohenwald in the event of the unionization of the Siegel plant. The news clippings and photographs comprising this column provide an illuminating insight to their author's look into the future. Eight clippings are headed as follows: "Police Probe Plant Shotting"; "Violence Marks Picket Line at Lawrenceburg"; "Non-Striker's Home Struck By Blasts"; "Dynamite Blast Shakes Oneida Plant"; "Violence Flares At Hickory Mill Plant in Wayne"; "10 Dynamite Sticks Found in Woman's Car";[19] "15 Pickets Held in Miner's Death"; and "Right to Close Up Upheld By Court". Underneath the last-described clipping is a part of the heading of another article, the rest of the heading and the article being torn away; for some reason only the first few words of the heading have not been torn away but are reproduced as part of the *"Tomorrow"* column—the words are "400 Killed In . . ." In addition to the foregoing there is a photograph of a man traversing a scene of devastation, with the following underneath the picture: "A 22-year old Murray Ohio worker

[19]Mayor Keaton testified that Respondent Siegel's operators are predominantly women.

walks through the ruins of a barn that was destroyed by fire Tuesday night near Henryville. Glen Cummings, shown above, checks 'tin and ashes,' the only remains of the barn and its contents of hay and corn which were completely destroyed by the fire. The barn was owned by Glen's father, John 'Sammy' Cummings who crossed picket lines at the bicycle plant less than a week ago. Within hours of the time the barn burned, a car belonging to another non-union worker was riddled [?] by shotgun blasts in the same area." The remaining item appears to be part of a legend to a photograph which is not shown, referring, so far as legible, to "Tires . . . slashed after members of Teamsters Local 327 began picketing . . . A later report from Lawrenceburg was that the tires had been removed from the automobile and burned and the automobile set up on blocks." A reading of the other clippings indicates that five of them (including the quoted two) refer to Murray-Ohio bicycle plant or a Teamsters Union; and that 8 of the 9 clippings refer to violence including shooting homicide, dynamiting, shotgun blasting of plant and nonstriker's home and automobile, arson, heaving of bricks through windshields, and tire slashing. Finally, Mayor Keaton's *"Tomorrow"* column contains a partial news clipping concerning the Supreme Court's decision in the Darlington case. The clipping is headed, "Right To Close Up Upheld By Court." The partial clipping points out that when that company went out of business "500 people in the town of about 6,000 population lost their jobs."

As to the foregoing, as already indicated, Respondent Siegel's Vice President Sam Siegel and its Hohenwald Plant Manager Honick denied knowledge of either the April 1 editorial or the April 8 notice in advance of their publication; as well as of the mailing of the April 1 editorial, although some 400 copies were mailed. As already stated, Mayor Keaton denied prior knowledge on the part of Siegel as to the *"content"* of the April 8 notice, and that

he was unable to "recall any conversation with them [i.e., Sam Siegel and Honick] that I was writing an article to be published in the paper." However, both Siegel and Honick conceded they read the April 1 editorial—Honick on April 1 or 2 when he received the newspaper in the mail; and also at least Honick the April 8 "article", notice, or advertisement on *April 8* (the day before the election), when it was left in the cars parked in Respondent Siegel's plant parking lot.[20] Sam Siegel and Honick conceded that at no time in any way did either of them, or anybody else on Respondent Siegel's behalf, disavow or disassociate or attempt to disavow or disassociate Respondent Siegel from the April 1 or April 8 publications or their distributions; each stating that he was not requested to do so, and Honick testifying with respect to the April 8 double-page spread handbilling of each car in the Siegel parking lot, that he "felt that his [i.e., Mayor Keaton's] name being on it would identify whoever put it in."

(5) Concluding Findings and Rationale

At the outset, it is noted that the Board has in effect already had before it the conduct here involved and has

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[20]Siegel Plant Manager Honick testified unequivocally that he found a copy of the Keaton double-page spread in his car at the plant on April 8 and also noticed others in other cars there. Sam Siegel's testimony on the same subject as observed by me appeared to be far from candid. He first testified that he saw the double-page spread "after the election." Then, asked whether a copy had not been left in his car on April 8, the day before the election, his response was, "I don't think I was here in my car." He then testified he "thinks" he was at the plant at least in the morning of the day before the election but "doubts" he was there in the afternoon. His next testimony was that "I don't recall being here that afternoon or not. I am not too sure." Asked whether as general manager he did not know that handbills had been left in every car in the plant parking lot, his answer was, "I don't live here." Finally, however, he conceded that he was still at the plant in the afternoon and that "probably" he "knew the contents of the advertisement [i.e., *GC Ex. 2B*] before [I] left Hohenwald that day, April the 8th . . . That afternoon."

stated its views thereon, including Respondent Siegel's accountability for Mayor Keaton's actions. No useful purpose would be served through regurgitation here of those views, which are clearly presented in the Board's June 28, 1966 decision. Contrary to Respondent Siegel's insistence, they should not be disregarded.[21] Moreover, this case is remarkably like another case involving Respondent Siegel recently decided by the Board, wherein the Board expressed similar sentiments; viz., *Henry I. Siegel, Inc.*, 165 NLRB No. 56, 65 LRRM 1505 (June 16, 1967; Eloy, Ariz.). The record made in the instant case before the trial examiner on the scene would independently of the Board's prior decisions impel the same result.

In cases of this type, the nature of the employee population, in terms of the milieu within which its functions, should not be ignored. There is a relativity even to threats. What to one type of employee in one location would be a potent threat (e.g., display of firearms to a New York City garment worker) might be weak compared to another kind of threat to another kind of employee in another kind of environment (e.g., threat of job loss, and of social and community ostracism, voiced concurrently by employer, mayor, and newspaper, in a small community where job opportunities are very scarce, but display of firearms is not particularly fearsome). An overhead gossamer may in the gnat's eye be a sword of Damocles. As the trial examiner

[21] It is recognized in this connection that the test of whether misconduct is sufficient to constitute an unfair labor practice or whether it merely merits setting aside an election, is not precisely identical, cf. *General Shoe Corporation*, 77 NLRB 124, 126-127; *Industrial Steel Products Company, Inc.*, 143 NLRB 336, 347; *Playskool Manufacturing Company*, 140 NLRB 1417, 1419; *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786-1787. However, here the Board has explicated in detail its basic views with regard to the actions involved. Although the outcome of the election case does not mandate the decision in this unfair labor practices case, it does not follow that the views expressed by the Board in the former should not in the latter be accorded the weight they deserve.

observed, Hohenwald is a small Tennessee community[23] in a semirural setting. It would be surprising indeed if a combination of employer, economic, community, social, and local governmental pressures could there be ignored with impunity or by other than the lion-hearted at risk of economic isolation and social ostracism if not worse. The total effect of a joinder of such pressures upon the factory population here involved may be minimized only at the cost of muting reality.

It is the effect of Respondent's pronouncements, taken at a reasonable running view, upon the persons at whom beamed, rather than their post-facto vacuumistic troy-weighing to a punctilio by others, which must govern. It is thus doubtful that the Employer's factory hands would react to the subtle semantical trabeculations deftly tooled into these communications, with the sophisticated sensitivity of savants of labor law. Omnipresent lurking realities of industrial relations life, known to the Board through daily exercise of its administrative stewardship over the Act, teach forcefully that what in sterile ivorytower ratiocination might represent borderline utterances arguably privileged by the seeming categorical imperatives of precedential generalizations, would on factory floor constitute loaded threats of job loss stabbing at economic survival of self and family. "What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart." *N.L.R.B.* v. *Federbush Co., Inc.*, 121 F. 2d 954, 957 (C.A. 2).

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[23] As pointed out in the Board's June 28, 1966 decision setting aside the election: "According to the U. S. Bureau of Census, the population of Hohenwald as of 1960 was 2,191 and the population of Lewis County [in which Hohenwald is located] was 6,249. According to the Employer, 108 of its employees live in Hohenwald and had street addresses, 209 had rural route addresses in Lewis County, and 83 lived in adjacent counties." (Board Decision on Review, June 28, 1966, Case No. 26-RM-179, p. 2 fn. 2.)

There is no true necessity here to engage in eclectic dissection of Respondents' communications phrase by phrase, so as to filet the impermissible from the permissible. As is common in cases of this type, the communications include some words, phrases, and sentences which in isolation are in no way improper because clear in meaning and privileged in thrust. However, as is further usual in such cases, there is also a skilful interlarding of threats and half-threats veiled in differing degrees of transparency. There is also much of the tricky language of ambiguity, some subtle and some less so. As is known to all trained at the Bar, such Janus-headed communication serves the useful double purpose of, on the one hand, traducing those at whom aimed and, on the other hand—that real purpose having been accomplished—being of sufficiently ambiguous *entendre* to be susceptible of deft argumentative minimization when subjected to regulatory agency or court scrutiny, as being allegedly no more than the crude communicative endeavor of unschooled innocence misconstrued by overzealous law enforcement officials. But even apart from undertaking a comprehensive substantive analysis of the language itself from the point of view of those upon whom it was actually used, a fair standard is that he who has unleashed the murky overtones of double *entendre*, in preference to simple words sterile of threat, should be held accountable therefor—somewhat as is an insurer who markets an ambiguous form—since it is he who chose to present it in that way and who utilized it to his advantage. Cf. *N.L.R.B.* v. *Miller*, 341 F. 2d 870, 874 (C.A. 2). We have long since been taught that "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used" (Holmes, J., in *Towne* v. *Eisner*, 245 U. S. 418, 425) and that "Words are not pebbles in alien juxtaposi-

tion; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part." (Learned Hand, J., in *N.L.R.B.* v. *Federbush Co., Inc., supra* at 957).

"Proof positive" that statements in a given context actually coerced employees is unessential to establish violation of Section 8(a)(1) of the Act. It is sufficient "even though the statements may not be directly coercive, if they could be reasonably so construed by the employee" (*N.L.R.B.* v. *Electric Steam Radiator Corporation,* 321 F. 2d 733, 736 [C.A. 6]; see also, *Wausau Steel Corporation* v. *N.L.R.B.,* 377 F. 2d 369, 372 (C.A. 7); *N.L.R.B.* v. *Ford,* 170 F. 2d 735, 738 [C.A. 6]), or if "the words used . . . *in vacuo,* may have been innocent, in the context . . . in which the words were spoken they can reasonably be regarded as ominous" (*Local 901, Int'l Brotherhood of Teamsters* v. *Compton,* 291 F. 2d 793, 797 [C.A. 1]). As recently expressed by Mr. Justice Harlan for a unanimous Court, such utterances, including what is pointedly left unsaid but suggested to the imagination of even the unimaginative, carry "the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." (*N.L.R.B.* v. *Exchange Parts Co.,* 375 U. S. 405, 409.) Respondents' election-eve pronouncements expressly and by that implication which all recognize to be no less clear than expression, tolled for employees the ominous note that if they desired to bargain collectively (as the Act guarantees them the right to do), they would imperil their existing benefits and advantages and jeopardize those which would otherwise be forthcoming in the future. Employees were painted a reign of terror and vio-

lence in the event of unionization, with strikes, income slashed and eliminated, and plant closed in a community destroyed. It was indicated that the best employees could look forward to from collective bargaining was payment of dues and tribute to the union, at the loss of existing and future benefits, privileges, and liberty, and that it would be futile for them to attempt to bargain collectively. It was also indicated to employees (by Plant Manager Honick) that—contrary to law (cf., e.g., *N.L.R.B.* v. *Graber Mfg. Co.*, 382 F. 2d 990 [C.A. 7])—unionization would bring a loss of employees' statutorily protected right to present their own grievances to management. In totality, Respondents' preelection pronouncements, in their 9-day preelection blitzkrieg, were no less than a potent threat of a new era disastrous to the employees' aspirations if not their very continued economic existence, in the event they were so unintelligent and foolhardy as to seek to avail themselves of their statutory right to bargain collectively. "[T]he desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action." *Radio Officers' Union* v. *N.L.R.B.*, 347 U. S. 17, 46. "There is no more effective way to dissuade employees from voting for a collective-bargaining representative than to tell them that their votes for such a representative will avail them nothing." *The Trane Co.*, 137 NLRB 1506, 1510. See also, *N.L.R.B.* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 981 (C.A. 3); *N.L.R.B.* v. *Gate City Cotton Mills*, 167 F. 2d 647, 648-649 (C.A. 5).

Subjecting, as we are required, Respondents' pronouncements, in their prevailing contextual envelope, to the indicated Board and judicial assays, it is apparent that the pronouncements here unfairly hobbled the employees' freedom of choice, thereby interfering with, restraining and coercing them in the statutorily-guaranteed security of the exercise of their right to bargain collectively instead of "bargaining" individually as their Employer insistently

made it clear they should continue to do at their peril. This Respondent Siegel accomplished by forcefully and unmistakably equating collective bargaining with such dread spectres as economic retrogression, violence, plant closure, and job loss—in short, disaster and ruin. Potent as this was, stabbing at the vitals of the continued welfare if not survival of employees and their families, the Employer's threat was superfatted by Mayor Keaton's dovetailing activities—with the Employer's knowledge, cooperative acquiescence, and exploitative approbation and ratification—which added the powerful aura of official sanction[23] to private coercion. Under the special circumstances in this particular community, Respondents' conjoined, time-integrated activities toward a common end constituted a synchronized *continuum* or high-pressure amalgam of threats and coercion which, in terms of the practical realities of the situation, are neither susceptible of nor require unblending one from the other. Although Siegel's described activities themselves violated Section 8(a)(1), Keaton's paralleling contributions—toward Siegel's ends—made them worse. In small communities like Hohenwald, there is a well-understood natural confluence of the rivulets of private (e.g., economic and social), semi-official, and official opinion-molding power structures which determine the compelling direction of the mainstream of the community. There is clearly discernible here a remarkable sameness in the nature of the warnings beamed at the employees by the Siegel executives and Mayor Keaton in their joint venture to stop collective bargaining from coming to Hohenwald. By their conjoined activities and pressures they placed a fearsome price tag upon the employees' mere naked exercise of a right which the Act was specifically designed to guarantee—namely, the right to bargain collectively in-

[23]Perhaps particularly in a community of the size of Hohenwald, the mayor in a direct sense constitutes the image of law and order.

stead of individually—free from such coercive restraint. A right is not free if its exercise must be attended with the necessity of braving the crossfire of such threats. None but the foolhardy will treat a warning of job loss by one having the power to make it come true, as other than a threat of job loss for the exercise of the "right" to unionize. Cf. *N.L.R.B.* v. *Nabors*, 196 F. 2d 272, 276 (C.A. 5); *N.L.R.B.* v. *Eastern Die Co.*, 340 F. 2d 607 (C.A. 1), cert. denied, 381 U. S. 951. "Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power." *N.L.R.B.* v. *Federbush Co., Inc.*, 121 F. 2d 954, 957 (C.A. 2).

The answer to Respondents' contention that their utterances are invulnerable to question because of Section 8(c) of the Act and the First Amendment to the Constitution, is simple. Section 8(c) expressly excepts from privileged "free speech" any "expression contain[ing] . . . threat of reprisal or force or promise of benefit"; and it has long since been emphasized by prime authority that the First Amendment is similarly bounded, cf. *N.L.R.B.* v. *United Steelworkers of America*, 357 U. S. 357, 362; *N.L.R.B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477, 478. Furthermore, "Even though such statements may be expressive of opinion only, if their reasonable tendency is coercive in effect, they are violative of Section 8(a)(1)." *N.L.R.B.* v. *Kingsford*, 313 F. 2d 826, 832 (C.A. 6).

It is accordingly found that, substantially as alleged in the complaint, Respondent Siegel, both through its own executives and through Mayor Keaton,[24] interfered with,

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[24] I.e., in view of: (1) the close integration of Siegel's acts with Keaton's as indicated herein and in the Board's June 28, 1966 decision in Case No. 26-RM-179; (2) Respondent Siegel's knowledge and exploitation of and its total failure to disavow or dis-

(Footnote continued on following page.)

restrained, and coerced employees in the exercise of rights guaranteed by Section 7, in violation of Section 8(a)(1), of the Act. *Amalgamated Clothing Workers of America, AFL-CIO* v. *N.L.R.B.*, 371 F. 2d 740 (C.A.D.C.), enfg. *Hamburg Shirt Corporation*, 156 NLRB 511; *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128, 137 (C.A. 8), cert. denied, 382 U. S. 904, enfg. 148 NLRB 827; *Bibb Mfg. Co.*, 188 F. 2d 825, 826-827 (C.A. 5); *Henry I. Siegel, Inc.*, 165 NLRB No. 56, 65 LRRM 1505; *Dean Industries, Inc. and Howard Stafford, Mayor of Pontotoc, Mississippi*, 162 NLRB No. 106, 64 LRRM 1198; *Henry I. Siegel Co., Inc.*, 26-RM-179, 62 LRRM 1629; *Universal Manufacturing Corp. of Mississippi*, 156 NLRB 1459; *Thunderbird Hotel, Inc.*, 152 NLRB 1416; *Henry I. Siegel Co., Inc.*, 148 NLRB 1192; *Utica-*

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associate itself in any way from Keaton's described activities, including Keaton's use of its list of employees' names and address (freely furnishd by Siegel) and Keaton's use of its plant parking lot premises for the described handbilling purposes; (3) the broad definition of "agency" in Section 2(13) of the Act, which the circumstances indicate Keaton here satisfies; (4) the factors adverted to *infra*, p. 24, as indicia of the joint and overlapping economic nature of the endeavor on the part of both Respondents. Although, as already stated, Respondent Siegel would be held in violation here even without considering Keaton's activities, it should be emphasized that to permit Siegel under the described circumstances to have the advantage of Keaton's activities while hiding behind his official skirts could serve to undermine and emasculate the Act by substituting for the national industrial relations policy intended thereby, a fragmented policy for every municipality and its local supporters throughout the nation. The result would be encouragement to proliferation of islands of lawless separatism from which, as privileged sanctuaries, economic warfare could be waged with impunity against law-abiding communities which do not hold themselves out to employers as havens of unionfree operations with bountiful labor supply. Such a result would be totally at odds with the policies and purposes of the Act as explicitly declared by Congress in its preamble. Under the total circumstances shown, viewed without excessive naivete, Siegel's plea that it was the mere innocent "beneficiary" of Keaton's self-propelled antiunion hostility, is rejected in fact and in law. Cf. *Nash* v. *Florida Industrial Commission*, U. S. , 66 LRRM 2625, 2627 (Dec. 5, 1967).

Herbrand Tool Division of Kelsey-Hayes Company, 145 NLRB 1717, 1719-1720.

Insofar as Mayor Keaton himself is concerned, it is found that by his described actions he also violated Section 8(a)(1) of the Act, both as participant in Respondent Siegel's described violations, as Siegel's instrumentality and agent within the broad statutory definition (Act, Sec. 2(13) and 2(2)), and also as an individual actor. In the latter regard, it is apparent that public officials, local or other, are not exempt from the requirement of obedience to law, including the National Labor Relations Act. To begin with, such individuals are not excluded from the Act's definitions of "person" or "employer" (Act, Sec. 2(1) and (2)), the latter expressly including "any person acting as an agent of an employer" (*id.,* Sec. 2(2)). The Board has had occasion to hold, in comparable situations, that public officials who fail to comply with the Act will be found to be in violation thereof. *Dean Industries, Inc. and Howard Stafford, Mayor of Pontotoc, Mississippi,* 162 NLRB No. 106, 64 LRRM 1198; *Thunderbird Hotel, Inc.,* 152 NLRB 1416.

It is contended that Mayor Keaton was merely expressing his own views. Mayor Keaton is, of course, entitled to his own views. But if their activation in conjunction with an employer's concurrent coercive restraints upon employees' clashes with legal requirements, he gains no immunity by reason of his mayoral office[25]; nor does the em-

[25]In a classic early case, *Ashby* v. *White,* 2 Ld. Raym. 938, 92 Engl. Rep. 126 (1703), it was stated:

"The single question in this case is, whether if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hinder'd to give it by the officer, if an action on the case will lie against such officer. . . . I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable,

(Footnote continued on following page.)

ployer who reaps the advantage of the resulting symbiotic amalgam with its own violation activities unattended by any attempt at disassociation or disavowal, by later insisting that they were no more than a coincidence of viewpoints. Otherwise, Mayor Keaton (as well as the mayor of every city, town, village, and hamlet in America) could override, and through him any employer could overcome, the Federal will. In this way, the Congressional policies enunciated for all in the Act, as well as other statutes, could be frustrated. It is insisted by Respondents that Mayor Keaton did not act on behalf of the Employer here, but acted on his own. Under the Act, no beribboned instrument at attornment is required to affix liability for violation upon actor or beneficiary. The Act expressly provides (Sec. 2(13)) and it has repeatedly been pointed out that common law tests of agency need not be fulfilled in these cases.[26] It may nevertheless be observed that even under

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because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. * * * So if a man give another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. * * * So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense . . . the gist of the action is, that the plaintiff having a right to stand for the place, and it being difficult to determine who had a majority, he had therefore a right to demand a poll, and the defendant by denying it was liable to an action. If publick officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offenses."

[26] E.g., *Amalgamated Clothing Workers of America, AFL-CIO* v. *N.L.R.B.*, 371 F. 2d 740, 744 (C.A.D.C.3; *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128, 136-137 (C.A. 8), cert. denied, 382 U. S.

(Footnote continued on following page.)

technical common law rules, agency through ratification, knowledgeable acceptance or retention of the fruits of the alleged agent's act, or through failure to disavow, are firmly recognized.[27] And where, unlike here, a degree of doubt were to be engendered because of the employer's indignant protestation of absolute innocence of association with the activities of well-intentioned and politically powerful civic-minded friends, a pattern of seeming behavioral parallelism in which the employer has, mayhap also innocently, been previously enmeshed[28] * * * a matter of official knowledge to the Board in execution of its statutory responsibilities—perhaps ought not to be overlooked. The mantle of innocence may become mottled by age spots.

The circumstances clearly indicate that the efforts to stop unionization of the Siegel Hohenwald plant constituted a joint endeavor in which Respondent Keaton actively participated with Respondent Siegel. In so concluding, effect has been given among other circumstances to the following:—the preeminent role of Keaton in procuring Siegel to locate a factory in Hohenwald in a context of Keaton's strong views about plentiful labor supply untainted by unionism—i.e., exercise of rights to bargain collectively as

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904; *N.L.R.B.* v. *Arkansas-Louisiana Gas Company*, 333 F. 2d 790, 795-796 (C.A. 8); *Henry I. Siegel, Inc.*, 165 NLRB No. 56, 65 LRRM 1505; *Dean Industries, Inc. and Howard Stafford, Mayor of Pontotoc, Mississippi*, 162 NLRB No. 106, 64 LRRM 1198. "It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of *respondeat superior*. *International Association of Machinists* v. *Labor Board*, 311 U. S. 72, 80; *Heinz Co.* v. *Labor Board*, 311 U. S. 514." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 295.

[27]Restatement (Second) Agency, ch. 4. See also, *Amalgamated Clothing Workers of America, AFL-CIO* v. *N.L.R.B.*, 371 F. 2d 740, 744 (C.A.D.C.); *Intertype Company* v. *N.L.R.B.*, 371 F. 2d 787, 788 (C.A. 4); *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128, 137 (C.A. 8), cert. denied, 382 U.S. 904; *Henry I. Siegel, Inc.*, 165 NLRB No. 56, 65 LRRM 1505.

[28]See *Table I, infra.*

guaranteed by Federal law; the financial stake of the City of Hohenwald arising out of its obligations on the Siegel factory industrial construction bonds, to eliminate any cloud on the horizon to Siegel's continuation of its factory in Hohenwald, such as might be presented by its unionization; the size and closely-knit nature of Hohenwald as a community; the social ties[29] between Siegel executives and Keaton; Keaton's activist role in trying to prevent the Siegel plant from becoming unionized, including his procuring his nephew newspaper owner to write an editorial on the subject in the only local newspaper, and also Keaton's alleged purchase at his own expense of a double-page advertisement warning Siegel employees against unionization; Siegel's furnishing of lists of names and addresses of its employees utilized for the purpose of Keaton's mailing to Siegel's employees of Keaton's nephew's anti-Union newspaper editorial[30] as well as of Keaton's double-page spread; Keaton's personal organization of the handbilling of automobiles in the Siegel factory parking lot, with knowledge thereof on the part of Siegel executives; the remarkable sameness of the warnings and arguments concurrently beamed at the employees by Siegel and by Keaton; Siegel's knowledge of Keaton's preelection anti-Union activities[31] and failure in any way, publicly or privately,

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[29]Mayor Keaton testified that he is friendly with Sam Siegel and that "I have visited in his home for years and Mr. Siegel has visited in my home on many occasions."

[30]As noted in the Board's June 28, 1966 Decision on Review of the Regional Director's June 23, 1965 determination setting aside the April 9 election (Case No. 26-RM-179), one of the Union's objections to the election (upheld by the Regional Director) was Siegel's refusal to accede to the Union's request for the names and addresses of eligible voters.

[31]Upon testimonial demeanor observations and the record as a whole, I reject Sam Siegel's unpersuasive suggestions that he was unaware of what Mayor Keaton was doing. Keaton's own testimony indicates the opposite, including his receipt of the list of employees' names and addresses from Sam Siegel, utilized for his

(Footnote continued on following page.)

toward its employees or otherwise, to disavow or disassociate itself therefrom. Under the circumstances, while in general otherwise favorably impressed with the testimonial demeanor of Mayor Keaton, I found unconvincing and therefore cannot credit his testimony to the effect that he undertook and carried out his activities designed to defeat unionization of the Siegel Hohenwald plant purely on his own initiative and at his personal expense, without request of or so much as mentioning it to Siegel. Resolving credibility on this aspect, in the light of the record as a whole, I find, to the contrary, that the Siegel-Keaton activities to halt unionization of the Siegel plant in Hohenwald constituted an integrated plan, effort, and enterprise.

It is accordingly found that Respondent Keaton individually, as well as agent of Respondent Siegel within the statutory definition, by his described actions and participation in Respondent Siegel's unlawful activities, interfered with, restrained, and coerced employees in the exercise of their rights guaranteed under Section 7, in violation of Section 8(a)(1), of the Act.

Upon the foregoing findings and the entire record, I state the following:

IV.

Conclusions of Law

1. At all material times, Respondent Henry I. Siegel Co., Inc. has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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preelection anti-Union propagandizing of the employees although, in response to questioning by Siegel's counsel, Keaton indicated he could not "recall' being asked or telling the purpose for the list. Mayor Keaton testified, however, that Siegel "knew that I needed it for a purpose in connection with trying to secure industry," and he conceded that Siegel "knew that [I] would use it the right way." A similar list of eligible voters had been refused by Siegel to the Union, resulting in a Union objection to the election which the Regional Director sustained.

2. At all material times, Respondent W. C. Keaton has been an agent of Respondent Siegel within the meaning of Section 2(13) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, Amalgamated Clothing Workers of America, AFL-CIO, has been and is a labor organization within the meaning of Section 2(5) of the Act.

4. Assertion of jurisdiction in this proceeding is proper.

5. By their conduct set forth in Section III which has been found to constitute unfair labor practices, Respondents and each of them have interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.[32]

V.

The Remedy

We move now to the question of remedy.

At the conclusion of General Counsel's case, the Charging Party (Union) sought permission to present proof of its representation strength in the bargaining unit, relating to its recognitional-bargaining request which Respondent Siegel had refused. This application was opposed by Respondent Siegel (as well as by General Counsel) upon the ground that after investigation General Counsel had declined to include in his complaint here an allegation of violation of Section 8(a)(5) of the Act, notwithstanding a Union charge to that effect. The Union made it clear that it sought no amendment or expansion of the complaint, which is limited to allegations of violation of Section 8(a)(1). I granted the Union's application for the reason that

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[32]For Additional Conclusions of Law 6 and 7, see *infra*, Section V, "The Remedy."

the Board has issued bargaining orders based upon Section 8(a)(1) violation, in absence of any Section 8(a)(5) violation or allegation and even in absence of a bargaining request, where circumstances warrant in the presence of a union majority and flagrant unfair labor practices.[33] However, in view of the extensive, prolonged litigation on this aspect of the case suggested by the Employer's indication that it would individually contest the Union's representation designation cards (said to grossly total approximately 300 in the bargaining unit of approximately 400), I granted Respondents and General Counsel time to apply to the Board for leave to appeal from this ruling. Subject to the Board's ruling and possible necessity for continuing the hearing on this aspect (i.e., Union representation strength) alone, all parties rested. Respondent Siegel, but not General Counsel, thereupon petitioned the Board for leave to appeal from this ruling. By its order of July 17, 1967, the Board denied leave to appeal, without prejudice. Thereafter, prompted by desire to avoid, or at least to bring within reasonable limits, what otherwise loomed as a monumental litigation involving hundreds of Union cards, on July 26, 1967, I issued an order setting the case for further hearing, requiring statements of the parties' positions, and regulating the future course of the hearing. This order among other things required the Union to furnish to the

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[33]See, e.g.: *J. C. Penney Co.* v. *N.L.R.B.*, F. 2d , 66 LRRM 2069 and 2272 (C.A. 10); *Wausau Steel Corporation* v. *N.L.R.B.*, 377 F. 2d 369, 373-374 (C.A. 7); *United Steelworkers of America, AFL-CIO* v. *N.L.R.B.*, 376 F. 2d 770, 772-773 (C.A.D.C.); *N.L.R.B.* v. *Delight Bakery, Inc.*, 353 F. 2d 344, 347 (C.A. 6); *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U. S. 904; *Local No. 152* v. *N.L.R.B.*, 343 F. 2d 307 (C.A.D.C.); *Piasecki Airfraft Corporation* v. *N.L.R.B.*, 280 F. 2d 575 (C.A. 3), cert. denied, 364 U. S. 912; *Summit Mining Corporation* v. *N.L.R.B.*, 260 F. 2d 894, 900 (C.A. 3); *N.L.R.B.* v. *Caldarera*, 209 F. 2d 265, 268-269 (C.A. 8); *D. H. Holmes Co.* v. *N.L.R.B.*, 179 F. 2d 876 (C.A. 5) enforcing order 81 NLRB 753, 756. Cf. *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2).

Employer a photocopy of each of the Union representation designation cards relied upon, the Employer thereupon to state its defenses thereto. Although the Union complied with this order, Respondent Siegel sought leave to appeal to the Board therefrom. By its order of August 22, 1967, the Board denied leave to appeal. Respondent Siegel thereupon complied with the order. Undoubtedly an extremely substantial amount of trial time was saved in this way, since the issues were thereby clearly identified and narrowed and the labors of the ensuing hearing relatively sharply delineated.[34] The hearing was accordingly resumed, limited to the issues raised by the parties' disclosed positions in the voluminous but informative documents exchanged in compliance with the July 26, 1967, order. Early in the resumed hearing, a substantial issue presented itself as to the identities and numbers of employees within the bargaining unit on various dates covering a period of several months (i.e., from the date of the Union's January 18, 1965, bargaining request to the April 9, 1965, election). In response to the Union's subpoena, the Employer produced voluminous records bearing on this issue. Consistent with the practice initiated by me in the July 26, 1967, order, I suspended the hearing so as to afford reasonable opportunity for study of the subpoenaed records, upon the basis of which on September 13, 1967, I orally directed a further exchange of position statements of the parties as a preliminary to continuing the hearing. By September 27, 1967, letter from Union counsel, I was informed that the Union was unable to establish a majority but that at one point it held representation authorization cards of precisely 50% (197 of 394) of the unit employees; and requesting leave thus to establish the extent of its rep-

[34] "Administrative hearings, like court hearings, should concern the real issues between the parties." *Harvey Aluminum (Incorporated)* v. *N.L.R.B.*, 335 F. 2d 749, 758 (C.A. 9). Cf. Gardner, *Shrinking the Big Case*, 16 ABA Admin. L. Rev. 5 (1963).

resentation strength, even though short of an absolute arithmetical majority, at a resumed hearing, on the theory that but for Respondents' unfair labor practices it would have attained a majority. By application dated October 6,[35] General Counsel moved for an order closing the hearing in view of the Union's conceded inability to establish a numerical majority, which in the General Counsel's view precluded a bargaining order remedy. After the case was removed by me from the calendar *sine die* on October 16, 1967, Union counsel filed a voluminous offer of proof, offering primary to establish that it held valid Union representation designation cards from as many as 50% of the employees in the appropriate bargaining unit, as indicated above. No objection was received to the proposed offer of proof. My further order of October 23 closed the hearing record, with leave to all parties to propose findings of fact and conclusions of law and to submit briefs.[36]

Upon receipt of the concession from Union counsel that it is unable to establish that it held Union representation designation cards from a majority of employees in the bargaining unit at any time material herein, I closed the hearing record because I agree with General Counsel's position in its motion of October 6, 1967, which is hereby granted, that such a majority is a precondition to a bargaining order. The Board has so held, expressly rejecting the contention here advanced by the Union that it is entitled to a

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[35]Received by me on October 10, prior to which I had on October 9 written counsel requesting the definitive statements of position contemplated by my September 13 order.

[36]All documents filed or received from counsel, as well as copies of the trial examiner's orders and communications to counsel, not heretofore marked in evidence at the hearing, have in accordance with the provisions of my order of October 23, 1967 and the Charging Party's application, which is hereby granted, been identified, marked, and incorporated into the hearing record as exhibits, or as proffered and rejected exhibits, in accordance with a list hereto annexed as *"Appendix A."* [Petitioner's note, Appendix A has been deleted.]

bargaining order since, but for the Employer's unfair labor practices, it would have attained a majority. See *J. P. Stevens and Co., Inc. (II)*, 163 NLRB No. 24, slip op. at pp. 29-30, 64 LRRM 1289; *Soctt's, Inc.*, 159 NLRB No. 146, slip op. at pp. 14-15, 62 LRRM 1543, 1549, enfd. as mod., 383 F. 2d 230, 234 (C.A.D.C.); *J. P. Stevens and Co., Inc. (I)*, 157 NLRB 869, 877, enfd. as mod., 380 F. 2d 292 (C.A. 2); *H. W. Elson Bottling Company*, 155 NLRB 714, 715-716, enfd. as mod., 379 F. 2d 223 (C.A. 6); *Tennsco Corp.*, 141 NLRB 296, enf. denied, 339 F. 2d 396 (C.A. 6). It is noted that in *Henry I. Siegel, Inc.*, 165 NLRB No. 56, 65 LRRM 1505 (June 16, 1967; Eloy, Ariz.), the Union controlled a majority. Cf. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264-266; *Franks Bros. Co.* v. *N.L.R.B.*, 321 U. S. 702, 704-706; *J. P. Stevens & Co., Inc. (I)* v. *N.L.R.B.*, 380 F. 2d292, 303-304 (C.A. 2); *Bannon Mills, Inc.*, 146 NLRB 611, 614; Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 138-139 & n. 274 (1964). It cannot be denied that where an employer has prevented a technical Union majority with the union at the very threshold, in a large unit, absence of an effective remedy would seem to encourage employers to violate the Act, cf. *Local Union No. 2, United Assn. Journeymen, etc.*, 152 NLRB 1093, 1114, enfd. as mod., 360 F. 2d 428 (C.A. 2), citing *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344. Any revision of Board policy on this matter must come from the Board in a case and under circumstances that it deems appropriate, cf. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 and cases cited n. 2; *Insurance Agents' International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768, 773; *Ranco, Inc.*, 109 NLRB 998, 1009-1010 n. 8. I accordingly decline to accept the Union's offer of proof pertaining to these Union cards and deny its application for a bargaining order. In so holding, it is assumed for purposes of this proceeding as

tendered by the Union's offer of proof, that its January 18, 1965, recognitional-bargaining demand upon Siegel was a continuing demand until the date of the April 9, 1965, election, and that at some time during the intervening period the Union held unambiguous, unequivocal, and valid representation designation cards from 50% (i.e., 197 of 394) of the Siegel Hohenwald employees in an appropriate bargaining unit.

In accordance with the foregoing and upon the entire record, I state the following:

Additional Conclusions of Law

6. [37]At all material times, the following has been and Section IV, *supra.*
is a unit of employees at Respondent Siegel's Hohenwald, Tennessee, plant, appropriate for purposes of collective bargaining: All production and maintenance employees at the Hohenwald, Tennessee, plant of Henry I. Siegel Co., Inc., including quality samplers, stock and service personnel, plant clerical employees, janitors, watchmen and machinists, but excluding office clerical employees, guards, foreladies and other supervisors as defined in the Act.

7. In view of the fact (conceded by the Union) that the Union has not on or subsequent to its January 18, 1965, request upon Respondent Siegel for recognition as the bargaining representative of said Respondent's employees in the above appropriate bargaining unit, represented an arithmetical majority of said employees, the Union is not entitled to a bargaining order herein, notwithstanding:

a. the Union's representation in the week ending April 10, 1965 of 197 out of 394 or 50% of the employees in said appropriate bargaining unit [38]; and

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[37]Numbered in continuation of Conclusions of Law set forth in

[38]Not established or found factually herein, but merely assumed in view of my rejection as matter of law (for reasons explicated in Section V, "The Remedy," *supra*) of the Union's offer of proof to this effect.

b. the nature and extent of unfair labor practices, as found herein, and Respondent Siegel's previous history of unfair labor practices, and the other circumstances detailed herein; and

c. that the Union would have attained such majority representation status[38] except for Respondent Siegel's unfair labor practices as found herein.

* * * * * * *

Although, as indicated above, under controlling Board law the Union is not entitled to a bargaining order here upon the proof proffered, it does not follow that the Union should be afforded no relief other than the usual Notice posting, which it persuasively urges would provide it no redress for wrongs suffered and would be largely ineffectual here. The question of remedy under the indicated circumstances therefore commands consideration, and it is to that question we now address ourselves.

Respondent Siegel is no stranger to the Board. It has had a long history before the Board. We are told that in fashioning an appropriate remedy we may properly consider such a history. *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348-349; *Truck Drivers & Helpers Local Union No. 728, Teamsters* v. *N.L.R.B.*, 332 F. 2d 693, 695, 697 (C.A. 5), cert. denied, 379 U. S. 913; *Local 138, etc.* v. *N.L.R.B.*, 321 F. 2d 130, 138 (C.A. 2); *N.L.R.B.* v. *Springfield Building & Const. Trades Council*, 262 F. 2d 494, 498-499 (C.A. 1), cited with approval in *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U. S. 322; Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865, 892 (1963).

Siegel's history with the Board is shown in *Table I.*

RESPONDENT SIEGEL'S HISTORY WITH THE BOARD

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2	3	4	5	6	7	8	9
no-cal ence o.	Date(s) or Period(s) of Act(s) Involved	Locale(s)	NLRB Case(s) No(s).	Charging Party	Act Section(s) and Issue(s) Involved	NLRB Case Citation(s), Decision(s), and Order(s), with Date(s)	Court Citation(s), Decision(s), & Decree(s), with Date(s)	Comments
no-cal ence o.	Date(s) or Period(s) of Act(s) Involved	Locale(s)	NLRB Case(s) No(s).	Charging Party	Act Section(s) and Issue(s) Involved	NLRB Case Citation(s), Decision(s), and Order(s), with Date(s)	Court Citation(s), Decision(s), & Decree(s), with Date(s)	Comments
no-cal ence o.	Date(s) or Period(s) of Act(s) Involved	Locale(s)	NLRB Case(s) No(s).	Charging Party	Act Section(s) and Issue(s) Involved	NLRB Case Citation(s), Decision(s), and Order(s), with Date(s)	Court Citation(s), Decision(s), & Decree(s), with Date(s)	Comments
no-cal ence o.	Date(s) or Period(s) of Act(s) Involved	Locale(s)	NLRB Case(s) No(s).	Charging Party	Act Section(s) and Issue(s) Involved	NLRB Case Citation(s), Decision(s), and Order(s), with Date(s)	Court Citation(s), Decision(s), & Decree(s), with Date(s)	Comments
	Dec., 1942-Jan., 1943	Dickson, Tenn.	C-2682	Amalgamated Clothing Workers of America	Sec. 8(1) & 3; Siegel locked out employees and closed plant for union activities; refused to reinstate locked-out employees; threatened employees with arrest, plant closure, and changed work conditions; and incited community businessmen and others to oppose plant unionism. Involves local authorities aligned in interest with Siegel.	52 NLRB 810 (1943): Dismissed on Trial Examiner's findings for lack of substantial credible evidence	- - - - - - - - - -	Mayor of Dickson had agreed to provide Siegel with rent-free plant for 5 years. Title to property was acquired by public trusteeship and 1500 persons pledged 6% of their earnings into a sinking fund to amortize underlying mortgage. When agreed payments were not forthcoming and possessory proceedings were instituted against Siegel to regain possession of plant, Siegel purchased underlying mortgage and rented premises from trusteeship.
	Jan., 1943	Dickson, Tenn.	R-4772	Amalgamated Clothing Workers of America	Siegel refused to recognize or bargain with Union	47 NLRB 74 (1943): Election ordered within 30 days.	- - - - - - - - - -	1. Siegel's Dickson plant (700 employees) closed down at time of hearing. 2. Siegel did not attend hearing. 3. Siegel refused to produce subpoenaed payroll records.
	Oct., 1947	Fulton, Ky.	9-RC-9	Amalgamated Clothing Workers of America	Siegel refused to recognize or bargain with Union. Siegel defended upon ground it was negotiating renewal agreement with United Garment Workers of America Local 319.	76 NLRB 976 (1948): Election ordered within 30 days.	- - - - - - - - - -	

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	Sep., 1961-June., 1964	(1) Dickson, Tenn. and (2) Fulton, Ky.	26-CA-1179	Amalgamated Clothing Workers of America	Sec. 8(a)(1) & (5); Siegel refused to incorporate wage incentive into collective bargaining agreement after agreeing to it.	1. 140 NLRB 1292 (1963): Dismissed upon ground wage incentive factor was in effect incorporated into collective agreement. 2. On remand, 147 NLRB 594 (1964): Siegel violated Sec. 8(a)(1) & (5) by failing to incorporate wage incentive factor into collective agreement; no waiver by Union.	1. 324 F. 2d 228 (C.A. 2; 1963): Reversed and remanded. Board determination that wage incentive factor was incorporated into contract, not supported by record, thus establishing violation by Siegel of Sec. 8(a)(1) & (5). Remanded to Board to pass on question of waiver. 2. 340 F. 2d 309 (C.A. 2; 1965); Enforced.	
5, 6, and 7	Apr.-Oct., 1962	(1) Bruceton, Tenn., (2) Trezevant, Tenn., and (3) Gleason, Tenn.	26-CA-1371 26-CA-1256 26-CA-1304	Amalgamated Clothing Workers of America	Sec. 8(a)(1); At its *Bruceton* plant, Siegel procured employees' affidavits filed with NLRB in interference with NLRB processes, coercively interrogated employees, conveyed impression of surveillance, threatened employees with reprisals and job loss, and made unlawful speech to employees. At its *Trezevant* plant, Union seeks to reopen settled unfair labor practice charges because of Siegel's violations at Bruceton plant. At its *Gleason* plant, Siegel conveyed impression of surveillance over employees union activities.	143 NLRB 382 (1963): As to *Bruceton* plant, Siegel held in violation except as to speech, surveillance, and one instance of alleged threat. As to *Trezevant* and *Gleason* plants, dismissed.	328 F. 2d 25 (C.A. 2; 1964); Enforced.	*3* cases, consolidated for hearing, involving 3 different Siegel plants.
8	Aug., 1963	New York, N. Y. (Dickson, Tenn. & Fulton, Ky.)	2-CA-9736	Amalgamated Clothing Workers of America	Sec. 8(a)(1) & (5); Siegel refused to incorporate wage incentive provision in 1963 collective	153 NLRB 1448 (1965): Dismissed (reversing Trial Examiner; decision by full Board).	- - - - - - - - -	Sequel to chronological reference No. 4, *supra*

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	May, 1963	Bruceton, Tenn.	26-RM-146	Amalgamated Clothing Workers of America	Siegel engaged in preelection misconduct affecting results of Board election. Involves local official and businessmen aligned on side of Siegel.	148 NLRB 1192 (1964): Charges sustained, election set aside, and new election ordered.	- - - - - - - - - -	Local official and businessmen were allegedly active in compaigning against Union. Although Board did not reach this aspect of case, Chairman McCulloch would also have sustained this objection to election.
	Mar.-Apr., 1965	Hohenwald, Tenn.	26-RM-179	Amalgamated Clothing Workers of America	Siegel engaged in preelection misconduct affecting results of Board election. Involves local authorities aligned on side of Siegel.	26-RM-179 (1966), 62 LRRM 1629: Charges sustained, election set aside, and new election ordered.	- - - - - - - - - -	1. Election held April 9, 1965. Board decision setting aside election and ordering new election to be held when conditions permit, June 28, 1966. No new election has yet been held. 2. Board held Siegel also responsible for coordinated anti-Union activities of Mayor. 3. Same conduct as involved in instant case.
	Mar.-Apr., 1965	Hohenwald, Tenn.	26-CA-2081	Amalgamated Clothing Workers of America	Sec. 8(a)(1); Economic threats of plant closure, job loss, jeopardy to existing benefits community disintegration, etc., in event of unionization. Involves local authorities aligned on side of Siegel.	- - - - - - - - - -	- - - - - - - - - -	Instant case.
13	May-Jul., 1965 & Feb., 1966	Eloy, Ariz.	28-CA-1251 & 28-RC-1326	Amalgamated Clothing Workers of America	8(a)(1) & (5); Siegel engaged in preelection misconduct affecting results of Board election, involving threats of reprisal and plant closure or conversion, a speech, and refusal to bargain with Union. Involves local citizens' committee aligned with Siegel.	165 NLRB No. 56, 65 LRRM 1505 (1967): Charges sustained, without reaching issue of legality of speech; Siegel held responsible for actions of local people because of close relationship, "overlap of financial interests," and failure to disavow parallel activities; bargaining order issued, in view of Union majority, notwithstanding Union loss of July 2, 1965 election as result of Siegel's misconduct	(Appeals by Union in C.A. D.C. and Siegel in C.A. 2 consolidated in C.A.D.C. by 9/27/67 C.A. 2 ordered)	Eloy, Ariz. (pop. 5400) Eloy Development Corp. sold stock, purchased land, constructed plant, & leased it to Siegel. Upon attempts to unionize, EDC group was extremely active in anti-union activity; also town, newspaper—involving publication of double-page newspaper advertisement and handbilling in Siegel parking lot and elsewhere.

Section 10(c) of the Act empowers the Board to order violators "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Test of this statutory authority has drawn from our highest court the characterization that it "charges the Board with the task of devising [effective] remedies." *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346.[39]

We are constantly adjured by higher authority to design effective remedies[40]; as shown, obedience to the Act's mandates requires no less.

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[39]Further experience appears amply to have borne out the concern of the statutory authors (voiced regarding another instance of need for effectual remedy for violation of the Act): "Experience . . . has demonstrated that . . . the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. . . . Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation." (S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 [1947].)

[40]See, e.g., *Fibreboard Corp.* v. *N.L.R.B.*, 379 U. S. 203, 215-217; *N.L.R.B.* v. *Erie Resister Corp.*, 373 U. S. 221, 236; *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346-349; *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U. S. 533, 539-540; *Philps Dodge Corp.* v. *N.L.R.B.*, 313 U. S. 177, 188, 194, 198. The Board's Chairman has accorded continuing recognition to this need. See, e.g., McCulloch, *A Tale of Two Cities: or Law in Action*, 1962 Proceedings of American Bar Association Section of Labor Relations Law, 14, 25, in which the Chairman spoke of the necessity for designing remedies "that will give more protection to the rights of self-organization, discourage unfair labor practices by unions and employers, and encourage the practice and procedure of collective bargaining." There are additional considerations here. "The fact that the [second] election is still to be held adds strength to the view that the policies of the Act would require an appropriate Board order to offset, insofar as such an order could do so, the effect of such unfair labor practices." *United Steelworkers of America, AFL-CIO* v. *N.L.R.B.*, F. 2d , slip op. at p. 4, 66 LRRM 2417, 2419 (C.A.D.C., Oct. 24, 1967). "Certainly it is not one of the

(Footnote continued on following page.)

Inasmuch as Respondents have been found to have violated the Act as indicated, I shall of course recommend the conventional posting-of-Notice remedy. However, in view of the repetitive pattern of the acts involved (cf., e.g., *Henry I. Siegel, Inc.*, 165 NLRB No. 56, 65 LRRM 1505; June 16, 1967, Eloy, Ariz.), the Employer's history with the Board (*Table I*), and the overall situation here involved—including the large number of employees in the unit, the substantial Union representation showing proffered, and the unfeasibility of holding a new election for a long period of time since the last election (April, 1965) which was aborted through Respondents' misconduct affecting the outcome * * * I am persuaded of the merit of the Union's contention that a garden-variety Notice posting here would not suffice to erase the effects of that misconduct or to promote the policies and purposes of the Act. I shall accordingly recommend that Respondents be required to take certain additional actions under the circumstances; viz., (1) that the Notice be posted for 6 months; (2) that the Notice be mailed to each employee, to counter the mailings to the employees of the various offending preelection communications from Respondents[41]; (3) that the Notice be published in the *Lewis County Herald*, to counter the offending preelection publication therein and

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purposes of the election provisions [of the Act] to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union." *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. denied, 341 U. S. 914.

[41]Cf. *IUE* v. *N.L.R.B. (Scott's, Inc.)*, 383 F. 2d 230, 232 (C.A. D.C.); *N.L.R.B.* v. *H. W. Elson Bottling Co.*, 379 F. 2d 223, 65 LRRM 2673, 2675 (C.A. 6); *J. P. Stevens and Co., Inc. (IV)*, 167 NLRB No. 38, 66 LRRM 1030, 1032; *J. P. Stevens and Co., Inc. (III)*, 167 NLRB No. 37, 66 LRRM 1024, 1030; *Marlene Industries Corp.*, 166 NLRB No. 58, slip. op. at p. 11, 65 LRRM 1626, 1632; *J. P. Stevens and Co., Inc. (I)*, 157 NLRB 869, 881, enfd. as mod., 380 F. 2d 292 (C.A. 2), cert. denied, U. S., 66 LRRM 2728 (Dec. 11, 1967).

handbilling and mailing therof[42]; (4) that in the event Respondent Siegel within 6 months at its expense assembles and addresses its employees regarding unionization or attempted exercise of any right under the Act, said Respondent shall provide like facilities for the same purpose to the Union, at the latter's request[43]; (5) that the Union shall for a period of 6 months be provided with reasonable access to and use of Respondent Siegel's Hohenwald plant bulletin boards for lawful Union purposes[44]; and (6) that Respondent Siegel shall for a period of 6 months keep the Union supplied, at the latter's request, with the names and residence addresses of all employees in the bargaining unit

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[42]Cf. *Dean Industries, Inc. and Howard Stafford, Mayor of Pontotoc, Mississippi*, 162 NLRB No. 106, 64 LRRM 1198; *Porto Mills, Inc.*, 149 NLRB 1454, 1473.

[43]Cf. *IUE* v. *N.L.R.B. (Scott's, Inc.)*, 383 F. 2d 230, 232 (C.A. D.C.); *N.L.R.B.* v. *H. W. Elson Bottling Co.*, 379 F. 2d 223, 65 LRRM 2673, 2675 (C.A. 6); *Montgomery Ward & Co.* v. *N.L.R.B.*, 339 F. 2d 889, 894 (C.A. 6). In this connection, it is found that in view of the rural and semirural nature of the area in which Respondent Employer's Hohenwald plant is located, and the configuration and wide geographical dispersion of residence addresses of unit employees, as well as the nature and extent of the employment turnover, provision of such reasonable access and facilities is essential, will tend in part to undo the effects of Respondents' unfair labor practices, and will promote the purposes and policies of the Act.

[44]Cf. *N.L.R.B.* v. *H. W. Elson Bottling Co.*, 379 F. 2d 223, 65 LRRM 2673, 2675 (C.A. 6); *J. P. Stevens and Co., Inc. (IV)*, 167 NLRB No. 38, 66 LRRM 1030, 1032; *J. P. Stevens and Co., Inc. (III)*, 167 NLRB No. 37, 66 LRRM 1024, 1030; *Marlene Industries Corp.*, 166 NLRB No. 58, slip op. at p. 11, 65 LRRM 1626, 1632. Cf. *J. P. Stevens & Co., Inc. (I)* v. *N.L.R.B.*, 380 F. 2d 292, 305 (C.A. 2). I find that in view of the rural and semirural nature of the area in which Respondent Employer's Hohenwald plant is located, and the configuration and wide geographical dispersion of residence addresses of unit employees, as well as the nature and extent of the employment turnover, provision of such reasonable access and facilities is essential, will tend in part to undo the effects of Respondents' unfair labor practices, and will promote the purposes and policies of the Act.

here found appropriate.[45];[46] Also, in view of the circumstances here present, including this Employer's history with the Board, I shall include the recommendation that it be required to cease and desist from infringing in any other manner upon the rights of employees guaranteed in Section 7 of the Act.

VI.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I recommended that it be:

ORDERED, that:

1. Respondent Henry I. Siegel Co., Inc., and its officers, agents, successors and assigns, and Respondent W. C. Keaton, Mayor of Hohenwald, and his agents and successors, shall:

a. Cease and desist from:

(1) Directly or indirectly threatening any employee with plant shutdown, strikes, violence, job loss, discharge,

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[45]Cf. *J. P. Stevens and Co., Inc. (IV)*, 167 NLRB No. 38, 66 LRRM 1030, 1032; *Marlene Industries Corp.*, 166 NLRB No. 58, slip op. at p. 11, 65 LRRM 1626, 1631. I find that in view of the rural and semirural nature of the area in which Respondent Employer's Hohenwald plant is located, and the configuration and wide geographical dispersion of residence addresses of unit employees, as well as the nature and extent of the employment turnover, provision of such data is reasonable and essential under all of the circumstances of this case, will tend in part to undo the effects of Respondents' unfair labor practices, and will promote the purposes and policies of the Act.

[46]In view of the potential propriety of requiring reimbursement to the Union of its organizing expenses (cf. Burger, J., in *Local 57, Garment Workers* v. *N.L.R.B. (Garwin Corp.)*, 374 F. 2d 295, 304 n. 22 (C.A.D.C.) , cert. denied, 387 U. S. 942), I have given consideration to but rejected such a remedy here, since it has neither been requested nor would the showing made, including the Employer's history before the Board *(Table I)*, appear to warrant it.

reduction of overtime and other work opportunities, loss or jeopardization of existing job benefits, loss of future employment opportunities through failure of other industries to locate or remain in the area, community disruption and disintegration, hazard to family well-being, or other economic harm, loss, detriment, disadvantage, reprisal, or retaliation, in the event of unionization or because of union or other lawful organizational membership, affiliation, sympathy, support, assistance, or activity, or for engaging or attempting to engage in the right to bargain collectively or exercise or attempt to exercise any other right under the Act.

(2) Directly or indirectly threatening any employee that union membership will be futile since no advantage or benefit would be derived therefrom which would not be derived in the absence thereof.

(3) Directly or indirectly threatening, informing, or advising any employee that in the event of unionization he will no longer be able to exercise the right to present individual grievances or complaints to or discuss mutual problems affecting his employment directly with his employer.

(4) Directly or indirectly making any threat or any inducement involving threat or the withholding of threat of economic harm, to any employee or employee's family, so as to procure or attempt to procure any employee to deal with Respondent Siegel individually instead of bargaining collectively.

(5) Directly or indirectly interfering with, restraining, coercing, or threatening any employee in the exercise of his right to select, elect, designate, be represented by, and bargain collectively through any labor organization of the employees' choice.

(6) Interfering in any other manner with, or restraining or coercing, any employee in the exercise of his right

to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of his own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

b. Take the following affirmative actions necessary to effectuate the policies of the Act:

(1) Respondent Siegel shall post in its factory in Hohenwald, Tennessee, copies of the Notice attached hereto marked "Appendix B."[47] Copies of said Notice, on forms provided by the Regional Director for the Twenty-sixth Region, shall, after being duly signed by said Respondent's authorized representative, be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 6 consecutive months thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said Notices are not altered, defaced, or covered by any other material.

(2) Respondents, jointly and severally, shall cause to be mailed, postpaid, within 30 days from the date hereof[48], to

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[47]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the Notice. In the further event that the Board's Order be enforced by a decree of a United States Circuit Court of Appeals, the words "A DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[48]This period shall automatically be deemed extended, *mutatis mutandis*, to commence from the date of any Board adoptive order or Court enforcement decree.

each employee of Respondent Siegel at his or her residence address, a full and exact copy of the Notice attached hereto marked "Appendix B."[49]

(3) Respondents, jointly and severally, shall cause to be published in the *Lewis County Herald* within 30 days from the date hereof,[50] at their sole cost and expense, a copy of the Notice attached hereto marked "Appendix B"[51]; and shall further, at their sole cost and expense, cause a copy thereof to be mailed postpaid to each and every Hohenwald, Tennessee, plant employee of Respondent Siegel. Said copy so published shall be arranged as a full double-page spread in format substantially the same as or reasonably comparable to that utilized for the announcement printed and distributed as a double-page spread over the signature or name of Respondent Keaton in said newspaper's issue of April 8, 1965.

(4) In the event that Respondent Siegel at any time or times within 6 months from the date hereof[52] assembles and addresses its Hohenwald plant employees concerning any aspect of said employees' protected concerted activities or their actual or attempted exercise, participation in or assertion of any right secured by the National Labor Relations Act as amended, said Respondent shall within a reasonable time or times after each such assemblage, on an equivalent basis, upon demand of the Union, provide like facilities and time, at said Respondent's expense, to the Union and its representatives, for the Union's organizational purposes.

(5) Respondent Siegel shall for a period of 6 months from the date hereof[53] provide to the Union and its repre-

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[49]See note, 47, *supra*. [Petitioner's note. Appendix B deleted.]
[50]See note 48, *supra*.
[51]See note 47, *supra*.
[52]See note 48, *supra*.
[53]See note 48, *supra*.

sentatives, for lawful Union purposes, reasonable access to and use of its Hohenwald, Tennessee, plant bulletin boards and all places where notices to employees are customarily posted.

(6) Respondent Siegel shall for a period of 6 months from the date hereof[54] furnish in writing to the Union, at the Union's request, the names and residence addresses of each and every employee in the bargaining unit at said Respondent's Hohenwald, Tennessee, plant here found appropriate for collective bargaining purposes.

(7) Respondents, jointly and severally, shall notify said Regional Director, in writing, within 20 days from receipt of this Decision and Recommended Order, what steps have been taken to comply therewith.[55]

2. The application of the Charging Party, Amalgamated Clothing Workers of America, AFL-CIO, for a bargaining order herein is hereby denied.

Dated at Washington, D. C. Dec. 29, 1967.

(s) Stanley N. Ohlbaum,
Trial Examiner.

APPENDIX D.

Cease and desist from:

(1) Directly or indirectly threatening any employee with plant shutdown, strikes, violence, job loss, discharge, reduction of overtime and other work opportunities, loss or jeopardization of existing job benefits, loss of future employment opportunities through failure of other industries to locate or remain in the area, community disruption and disintegration, hazard to family well-being, or other eco-

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[54]See note 48, *supra*.

[55]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Respondents, jointly and severally, shall notify said Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith."

nomic harm, loss, detriment, disadvantage, reprisal, or retaliation, in the event of unionization or because of union or other lawful organizational membership, affiliation, sympathy, support, assistance, or activity, or for engaging or attempting to engage in the right to bargain collectively or exercise or attempt to exercise any other right under the Act.

(2) Directly or indirectly threatening any employee with loss of economic benefits or changes in working conditions as a result of his joining a union.

(3) Directly or indirectly threatening, informing, or advising any employee that in the event of unionization he will no longer be able to exercise the right to present individual grievances or complaints to or discuss mutual problems affecting his employment directly with his employer.

(4) Directly or indirectly making any threat or any inducement involving threat or the withholding of threat of economic harm, to any employee or employee's family, so as to procure or attempt to procure any employee to deal with Respondent Siegel individually instead of bargaining collectively.

(5) Directly or indirectly interfering with, restraining, coercing, or threatening any employee in the exercise of his right to select, elect, designate, be represented by, and bargain collectively through any labor organization of the employees' choice.

(6) Interfering in any other manner with, or restraining or coercing, any employee in the exercise of his right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of his own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1525

HENRY I. SIEGEL CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17-39) is reported at 417 F. 2d 1206. The Board's decision and order (Pet. 40-107) are reported at 172 NLRB No. 88.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1969, and a petition for rehearing

was denied on March 24, 1970 (Pet. 2). The petition for a writ of certiorari was filed on May 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings.

2. Whether the Board's order is improperly broad or vague.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 3-4 of the petition.

STATEMENT

A. The Board's Findings of Fact

In 1954, the Company opened a men's clothing manufacturing plant in Hohenwald, a small Tennessee community (J.A. 127, 128; 51, 77-78).[1] In September 1962, the Amalgamated Clothing Workers of America, AFL-CIO, began organizing activities at the plant; eventually, a Board-conducted election was scheduled for April 9, 1965 (J.A. 129, 143, n. 13; 16, 125).

On March 31, 1965, Vice-President Sam Siegel sent the Company's employees a letter, which noted the "peace and harmony" that characterized the opera-

[1] "J.A." references are to the Joint Appendix filed in the court below.

tions of the Hohenwald plant since its inception and declared that the upcoming election would give the employees "the opportunity to determine whether or not this will continue." The letter then outlined the benefits the employees already enjoyed, and continued:

> THOSE ARE THE FACTS, SIMPLE, CONCISE AND CLEAR.
>
> Union organizers cannot present you with any facts. They can only make promises. Their promises are entirely irresponsible. Irresponsible because they are in no position to assure you that they will be fulfilled. The union itself, no matter what they promise you CAN NOT SET PRODUCTION STANDARDS—CAN NOT CHANGE WORKING CONDITIONS—CAN NEITHER HIRE NOR FIRE—NOR MAKE ANY CHANGES WHATSOEVER IN PLANT OPERATIONS. The union can guarantee you nothing.
>
> REMEMBER! ONLY THE COMPANY PROVIDES JOBS.
> ONLY THE COMPANY PAYS INSURANCE BENEFITS.
> ONLY THE COMPANY MAKES VACATIONS AND PAID HOLIDAYS POSSIBLE.
>
> What can the union do? They can collect dues, levy fines and assessments. Control your actions as employees. Call strikes.
>
> Look around you in a neighboring community the results of union agitation are easy to be seen. Violence—loss of work—disruption of community relations—destruction of private property—a town divided. Do you want this for Hohenwald? * * * [J.A. 130-132; 16, 23-25.]

On April 6, Vice-President Siegel sent another letter to the employees urging every worker to vote and assuring him "[t]he will of the majority will rule." The letter asserted that "[t]his decision which may affect your industrial future is too important to leave to others," and added:

> * * * if any union organizer told you that the union, itself, can arrange things so that you work less and get as much or more pay, that statement is simply not true. In the final analysis it is the company alone that provides jobs, creates payrolls and bears the whole responsibility for the operation of this plant.
>
> One thing is certain with a union comes dues, fines, and assessments—and the possibility of strikes—violence and loss of work. The rest of the rosy picture the union paints is nothing but empty promises—that they do not have the power to guarantee. [J.A. 130-132; 16, 23-26.]

On April 7, Plant Manager Honick addressed a letter to the employees, which reminded them that, in the past, work-related problems were resolved simply by walking into Honick's office and discussing them. The letter warned: "The relationships, that we both know works, would end if a union is voted in tomorrow" (J.A. 133-134; 17, 26-27).

Meanwhile, W.C. Keaton, the Mayor of Hohenwald, also embarked on a campaign to inform the Company's employees and the townspeople that he "did not think" unionization of the Company's plant "was best" (J.A. 73-74). Mayor Keaton's major objective as mayor was to attract industry to the Hohenwald

area (J.A. 141; 61, 62). He had been instrumental in bringing the Company's operations to Hohenwald (J.A. 127, 128, 141; 53-54, 66-70), and was well known as a good friend of Company Vice-President Sam Siegel (J.A. 143; 78-79, 96). As part of his effort to bring industry to Hohenwald, Keaton vigorously opposed any union activity (J.A. 143; 70-71). Keaton asked Siegel for a list of all the employees eligible to vote in the forthcoming election, together with their addresses (J.A. 143-144, 158, n. 24; 16, 75-76, 85, 87, 97, 105, 110-111, 121). He customarily received information about the plant's industrial make-up whenever he wished, because the Company knew he would "use it in the right way." Thus, Company officials did not ask Keaton why he needed the list, but "knew that [he] needed it for a purpose in connection with trying to secure industry" (J.A. 144, 162, n. 31; 85, 87, 88, 89, 106, 111). Keaton then induced his nephew, the editor of the only locally published newspaper, to "take a stand" on the coming election in an editorial (J.A. 144; 74-75, 80-81) and, using the list, mailed a copy of the newspaper containing the editorial to all the employees (J.A. 144; 16, 85). The editorial called attention to Hohenwald's increasing industrialization as a result of "a bountiful labor supply, and because people in Lewis County were interested in seeing Hohenwald a better place to live," and added:

> WE BELIEVE a vote for the union would jeopardize the future industrial expansion of Lewis County.

WE BELIEVE you will not have as many dollars in your possession at the end of the year if the plant here is organized.

WE BELIEVE you will not work as much overtime, as you now enjoy.

WE BELIEVE your fringe benefits will be no better, if as good, if your plant is organized.

WE BELIEVE there's a chance violence could erupt if the plant is organized, as has been the case in numerous other places in the state, and when it is over, we believe friendships, man's most important and cherished earthly possession would never be the same.

WE BELIEVE very few people in Hohenwald believe in this kind of actions.

WE BELIEVE, if you will think straight, rely solely on your own judgment, you will know you have nothing to gain by organizing the Henry I. Siegel Company. [J.A. 144-146; 18-19.]

On April 8, the day before the Board election, Keaton placed a two-page advertisement in the newspaper (J.A. 146-150; 16, 20-22). The advertisement was divided into three columns, the first of which (headed "*Yesterday*") briefly recounted the increase which had occurred in industrial employment, population, and income. The second column (headed "*Today*") declared "Today Hohenwald stands at the crossroads," and pointed out what the workers stood to lose if the Union won the election:

(1) $10,000 to $15,000 per year in union dues.
(2) Possibly reduction in wages to those of the union.

(3) Possibly reduction of Insurance plans to those of the union.
(4) Liberty and freedom.
Can any union guarantee any improvement for our workers?
Certainly not—only promises.
Could the Company close the plant?
Certainly, see the Supreme Court ruling of last week.

The final column (headed "*Tomorrow?*") consisted of newspaper clippings and photographs depicting incidents of labor violence elsewhere, only one of which, however, purportedly involved the Union. The column also included a partial news clipping concerning the decision in *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263; the clipping, headlined "Right To Close Up Upheld By Court," pointed out that when the Darlington Company went out of business "500 people in the town of about 6,000 population lost their jobs." As with the editorial, Keaton mailed copies of the newspaper containing the advertisement to the Company's employees; he also placed copies of the advertisement in all the automobiles in the Company's plant parking lot (J.A. 146-147; 16, 76-77, 81-82, 90, 93).

Also on April 8, Company President Jesse Siegel gave a speech to the employees (J.A. 134-140; 17, 27-35). After declaring that "[a] careful analysis of the history and development of this plant is the best means of predicting its future," Siegel stated:

> More than a decade ago this plant was opened. It was in many ways a cooperative venture be-

> tween the people of Hohenwald and Lewis County and the Siegel Company. Your elected city and county officials agreed to raise the money to build the factory through a bond issue and the Siegel Company agreed to sign a lease guaranteeing the payment of these bonds. We also agreed to provide employment to the fullest extent. Right from the beginning, then—the opening of the Hohenwald plant was a kind of partnership between the people of this community, you included, and the Henry I. Siegel Company. * * * [J.A. 136.]

Jesse Siegel then went on to recite the "record of our company," pointing out the rise in staff and wages, and the company's "most unique feature * * * continuous employment * * *." He next referred to the Company's insurance and hospitalization plan and said:

> People are asking what will happen to the insurance plans they now have if the union is voted in? That is an unanswerable question. It will be a subject for negotiation. No one, union organizers included, can tell you now what the results will be, however I can tell you that the plan you now have will continue if the union is not voted in. [J.A. 137.]

Characterizing the Union's promises as a "combination of less work and more money," Siegel added:

> Let's suppose that their wild promise could be realized—what would it mean. In our highly competitive industry, the ability to manufacture goods competitively is of prime importance if a plant is to operate successfully. There are hun-

> dreds of pants manufacturers throughout the country who would immediately be in a position to cut into your work. This kind of irresponsible promise reveals the short sightedness and shallow nature of the union's interest in the future progress of our plant. They feel you understand so little about the true situation that you will grab the bait without noticing the hook in it. In my opinion, if such a promise could come true it might well be the beginning of the end of the progress of the Hohenwald plant. [J.A. 138.]

Finally, Siegel spoke of the violence the Union had engaged in at other plants in the State, with the result that the employers closed them down, and told the employees "to look around you in your neighboring community, to see the destructive forces of unionism" (J.A. 139).

B. The Decisions Below

Upon the foregoing facts, the Board concluded that the Company, and Keaton acting as the Company's agent, violated Section 8(a)(1) of the Act by warning the Company's employees that selection of the Union as their bargaining representative would lead to loss of existing economic benefits, work, and plant closure (Pet. 41, 77-85, 86). In view of these violations, and of the Company's extensive record of prior violations of the Act (Pet. 92-97), the Board ordered the Company and Keaton to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining or coercing employees in the exercise of their rights to self organization; and to post appropriate notices (Pet. 42-43, 102-104).

The court of appeals (with Judge Weick dissenting) held that "the Board had before it substantial evidence from which to find the mayor acted as the company's agent within the meaning of the statute" (Pet. 31). The court also held that the mayor's statements and those of the Company officials contained threats of economic harm, violative of Section 8(a)(1) of the Act (Pet. 32-34). With minor modifications not relevant here, the court enforced the Board's order (Pet. 35-36).

ARGUMENT

1. Petitioner's contentions that the Board erred in holding the Company responsible for the conduct of Mayor Keaton (Pet. 8-12), and in concluding that their communications to the employees were not privileged free speech (Pet. 12-13), present only evidentiary issues which do not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, for the reasons set forth by the court below (Pet. 29-31), the Board was fully justified in imputing the conduct of Keaton to the Company.[2] Similarly, for the reasons given by the court below (Pet. 31-34), the Board was fully justified in concluding that the communications by the Company and Keaton tended

[2] Contrary to petitioner, this case does not raise the issue of when disavowal must be made to avoid vicarious responsibility (Pet. 9, 10-12). The court below specifically stated that it did "not reach the question of failure to disavow" (Pet. 31), since there was ample evidence that the Company had affirmatively approved Keaton's action.

to have a coercive impact on the employees, and thus violated Section 8(a)(1) of the Act. See *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620.

2. There is no substance to petitioner's complaint that the Board's order is overly broad (Pet. 14). The threats made by the Company and Keaton—to cancel employee benefits, to close down the plant, and to refuse to bargain with the Union—would, if carried out, constitute violations of Section 8(a)(1), (3), and (5) of the Act. Because top Company officials participated in making these widespread threats, and in view of the Company's past history as a violator of the National Labor Relations Act (Pet. 92-97), the Board was warranted in ordering the Company to refrain not only from the specific unfair labor practices found, but from "in any other manner" restraining or coercing employees.[3]

Nor is there merit to petitioner's further assertion that "it does not know and cannot reasonably ascertain the statements it must hereafter refrain from making" (Pet. 15). The Board's order (Pet. 102-104) is the typical form of remedy the Board prescribes for unfair labor practices like those committed here. It catalogues, with particularity, the various

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[3] *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, relied upon by petitioner, is not to the contrary. That decision recognized that broad orders are permissible to restrain other violations where it appears "that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *Id.* at 437.

threats made by the Company and its agent in their many communications to the employees, and requires the Company to cease and desist from repeating them in the future. Petitioner is free to express its views and opinions respecting unionization, so long as those statements do not, as did those here, threaten reprisal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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